IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-808

ANTHONY M. NATELLI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner Anthony M. Natelli respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit affirming his conviction for violation of Section 32(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78ff.

OPINIONS BELOW

The opinions of the court of appeals affirming petitioner's conviction and, on rehearing, reinstating the

conviction of codefendant Joseph Scansaroli have not yet been reported and appear in Appendices A and C, respectively, of this petition.

JURISDICTION

The judgment of the court of appeals affirming petitioner's conviction was entered on July 28, 1975. A timely petition for rehearing was denied on November 5, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent portions of the Sixth Amendment and of Sections 27 and 32(a) of the Securities Exchange Act of 1934 are set forth in Appendix E, *infra.*

QUESTIONS PRESENTED

1. Whether, in a prosecution under Section 32(a) of the Securities Exchange Act alleging that an independent professional accountant "willfully" and "knowingly" submitted a false financial statement containing *unaudited* figures, the accountant is entitled to instructions explaining that the professional obligations regarding unaudited financial data are different from those involving figures he has audited.

2. Whether the conviction of an independent professional accountant for "willfully" and "knowingly" making a materially false statement in violation of Section 32(a) of the Securities Exchange Act can be

based merely upon a finding that, though ignorant of the alleged falsity, he acted with a "reckless disregard" of the true facts but without a *conscious* purpose to avoid learning the truth.

3. Whether, in a prosecution involving multiple specifications of unlawful conduct contained in a single count, a general admonition that the "verdict" must be unanimous is sufficient to implement the Constitutional requirement that the jury must be unanimous on at least one particular specification before it can convict.

4. Whether the court of appeals erred in confining "to the facts" this Court's decision in *Travis v. United States,* 364 U.S. 631 (1964), and in permitting a prosecution for making a false statement in a document "required to be filed" with the SEC to be brought in a district other than the one in which the document was required to be and was in fact filed.

5. Whether petitioner was denied a fair trial when the government withheld crucial facts from and made affirmative misrepresentations to the jury.

STATEMENT

A. Introduction

This case presents important and recurring questions regarding the obligations of independent professional accountants under the Federal securities laws as they are enforced by criminal sanctions–in particular, whether an accountant is obliged to question unaudited figures in the same manner as audited presentations are scrutinized, and whether his failure to do so can support a conviction under a statute declaring it a felony to make a false

statement "knowingly" and "willfully." By the Government's own concession, this prosecution is the focal point of an attempt to fashion new standards of civil and criminal liability for accountants and lawyers.[1]

Petitioner Anthony M. Natelli, together with co-defendant Joseph Scansaroli, both certified public accountants, were convicted of "knowingly" and "willfully" making false or misleading statements with respect to material facts in a proxy statement issued by the National Student Marketing Corp. (NSMC) and filed with the SEC in September 1969. At all relevant times, petitioner was the partner in the accounting firm of Peat, Marwick, Mitchell & Co. (PMM) in charge of the firm's engagement to serve as independent accountants for NSMC. Co-defendant Scansaroli was the supervisor on that engagement, working under petitioner's general direction. The multi-count indictment that named petitioner and Scansaroli also charged five officers of NSMC with various violations of the securities laws and

[1]On the fifth day of trial, October 29, 1974, The Wall Street Journal described this prosecution as a "test case in the government's effort to enforce the securities laws against auditors and lawyers." Subsequently the Government submitted to the trial court a memorandum by the Chief Accountant of the SEC, acknowledging that he had been the source for the newspaper story as a result of an interview with the reporter involved.

The article, which also attributed to the source the statement that "if we can't get a conviction here we never will," was the subject of a defense motion for a mistrial on the ground of deliberate government misconduct in generating prejudicial publicity. The trial court, while not condoning the conduct of the SEC's Chief Accountant, denied the motion on the ground that the article had not "infected" the jury. (Tr. 2434). Petitioner argued on appeal that a defendant should not have the usual burden of showing prejudice where he seeks a sanction against prejudicial publicity that high government officials have deliberately planted in the press.

the conspiracy and mail fraud statutes. Four of those officers pleaded guilty to various counts prior to trial, and the trial of the fifth was severed. Scansaroli's conviction was first reversed by the court below and then reinstated on the government's petition for rehearing.[2]

We are constrained to express our belief at the outset that the court below, apparently relying on the government's brief, rested on unwarranted inferences from the evidence, even when that evidence is viewed in the light most favorable to the government. Accordingly, we note the relevant instances where the court below, in our view, diverged from what the jury fairly could have found.

B. The Audit of NSMC for Fiscal Year 1968

PMM was engaged to serve as independent accountants for NSMC in August 1968, two years after the company's formation. A different firm had previously performed accounting services for NSMC, including those incident to its first public offering of stock in April 1968. PMM's first task was to perform an audit of the company's financial statements for the fiscal year ended August 31, 1968. In the course of this audit, a question arose as to whether the income accrual used by NSMC for that fiscal year conformed to accepted accounting principles.

[2]Scansaroli's petition for rehearing of the decision reinstating his conviction is now before the Court of Appeals.

NSMC had been formed in 1966 to provide promotional and marketing services to companies desiring to sell their products to college students. Through a system of student representatives, NSMC offered its clients the opportunity to distribute promotional materials on campuses and to solicit business from students. Initially, NSMC's programs were designed to elicit a direct response from students to the client—such as the return of a coupon or order form in response to a mailing or poster—and NSMC was paid an agreed amount for each response. In 1968, however, NSMC began concentrating on securing fixed-fee contracts, proposing a promotional program tailored to a client's products at a fixed price. (Tr. 330-331, 335-338, 1826-1831).

Because the bulk of NSMC's work was completed by the time a proposal was prepared for a client, NSMC accrued as revenue a substantial part of the price of any proposal a client had agreed to accept. This procedure permitted the revenue a client would ultimately pay NSMC to be matched against the expenses the company incurred to develop the proposal. An independent CPA who advised NSMC prior to PMM's engagement had accepted the company's accrual of revenue upon representations by account executives that client representatives had orally promised to buy fixed-fee programs, and revenue so accrued was reflected in an unaudited nine-month earnings statement issued by the company for the period ended May 31, 1968. (Tr. 303-307, 469-482, 1494-1498, 1831-1832).

Petitioner initially was faced with the decision whether to object to this accrual of revenue. After

considering alternative accounting methods, including a suggestion by NSMC's president that the *total* fee on any commitment should be accrued, petitioner concluded that continued accrual of a *portion* of committed fees would not be improper, provided that company records allowed calculation of the accrued proportion. Under this "percentage of completion" accounting method, the accrued proportion was the percentage of the total estimated time to be expended on a contract that had been invested by NSMC during the fiscal year in question. (Tr. 1494-1498, 1830-1838)

Before accepting this accounting treatment, petitioner directed Scansaroli to verify directly with NSMC's clients the commitments recorded by NSMC and to obtain documentation from NSMC that would permit calculation of the appropriate completion percentages. Scansaroli met with NSMC account executives, reviewed their files, and made telephone calls to randomly-selected NSMC clients. A schedule from NSMC's comptroller and forms signed by account executives showed the gross amount of each client's commitment, the estimated cost to be incurred by NSMC for printing and distributing promotional materials for that client, and the account executive's estimate of the completion percentage. (Tr. 1921-1939 196, 1501-1505, 1838-1843; Gx3)

Income accrued in this manner appeared in the audited financial statement as "Unbilled receivables and estimated earnings on contracts in progress," and the percentage-of-completion method of accrual was fully explained in a footnote. (Gx. 5, pp. 19-20.)[3]

[3]The court below suggested that the accounting method used for the 1968 audited statement was "contrary to sound accounting practice" and furnished petitioner with a motive to falsify subsequent records in order to escape "severe criticism and possible liability." App. 13a. There was no evidence at trial, however, that percentage-of-completion accrual violated accepted accounting principles, and the CPA advising NSMC at the time of the unaudited nine-month statement published in June 1968 had

C. Petitioner's Post-Audit Communications with NSMC

Soon after completing the audit in early December 1968, petitioner advised NSMC's officers to improve the company's record-keeping procedures. At a meeting attended by NSMC's president, comptroller, and general counsel, petitioner stated that in the future the company should record income on a fixed-fee proposal only when a client made a written commitment. A few days thereafter, NSMC's counsel prepared a letter contract to be used for future commitments for fixed-fee programs, and petitioner was advised of counsel's judgment that such a letter would constitute an enforceable commitment. (Tr. 206-211, 490-492, 530-532, 673, 1845-1850; Natelli Ex. G)

In April or May 1969, petitioner learned from NSMC's general counsel that Robert Michaels, formerly the Director of Marketing for NSMC, had been fired for taking bribes from certain suppliers and that a subsequent investigation had revealed that sales commitments reported by Michaels and recorded by NSMC as accrued revenue for fiscal 1968 in fact never had existed. After confirming this report with NSMC's

permitted the company to use the method. Petitioner concluded that his insistence upon non-recognition of income until all services were performed would have produced a distortion of the company's financial record, because the change in accounting methods would have presented NSMC as a failing company, even though substantial resources invested by the company had in fact produced favorable oral commitments. (Tr. 1505, 1837; Gx3, pp. 1913-1914)

president, petitioner concluded that the appropriate accounting treatment was a retroactive write-off of the amounts involved since revenues and expenses attributable to these "commitments" never would have been accrued had the truth been known. The fraudulent Michaels contracts represented $748,762 in accrued revenues for fiscal 1968 and $539,012 in accrued expenses—costs NSMC never would incur on these accounts—so that the net effect of the write-off on 1968 profits was to reduce the sum originally reported by $209,750 (Tr. 370-373, 661-664, 1853-1857.)

At about this same time, petitioner received advice from Mrs. Carol Raimondo, an accountant in PMM's tax department, that NSMC's 1968 income statement contained an unnecessary expense item of $190,000 charged to a deferred tax account.[4] While preparing NSMC's federal income tax return for the 1968 fiscal year, Mrs. Raimondo concluded that a tax loss carry forward, which apparently had not been foreseen at the time of the audit, would result in a tax saving for NSMC, making unnecessary the $190,000 charge on NSMC's books. (Tr. 1381-1390, Natelli Ex. O & P.) After conferring with Mrs. Raimondo's superior, who agreed with her conclusions, petitioner concluded that the deferred tax entry should be removed from NSMC's books. (Tr. 1858-1862.)

[4]A deferred tax account is ordinarily included in a corporation's financial statement when, because of differences in tax and financial statement accounting methods, income reported in the financial statement exceeds that reportable for tax purposes. A charge to this account represents tax liability ultimately to be paid on income accrued for financial accounting purposes but not currently reported for tax purposes.

When NSMC sought assistance in making the necessary adjustments in the 1968 accounts, petitioner delegated to Scansaroli the preparation of appropriate entries. The entries Scansaroli prepared combined the write-off of the Michaels commitments with the write-off of the erroneous $190,000 charge to the deferred tax account, since these two components were nearly identical in amount and virtually cancelled one another in their effect upon NSMC's fiscal 1968 earnings. Scansaroli's initial entry, however, had not included one of the smaller Michaels commitments involving profits of $21,000, an omission that made the contract figure match almost exactly the amount of the tax item. When informed of this omission, petitioner insisted that this contract also be written off retroactively, and an appropriate entry to this effect was later made in NSMC's books.[5] (Tr. 1863-1867.)

D. Preparation of the September 1969 Proxy Statement And the Statements Alleged To Be False and Misleading

During the period from November 1968 to May 1969, NSMC had been engaged in an active program of acquiring other companies whose products had special appeal in the youth market. During the spring of 1969,

[5]The court of appeals stated that in making the entry Scansaroli had used "the device of rounding off the tax item to make it conform exactly to the write-off." App. 9a. This characterization simply ignores petitioner's insistence upon correction of Scansaroli's entries as soon as he learned of the $21,000 omission.

NSMC's officers decided to call a stockholder's meeting in order to authorize the issuance of additional shares needed for completion of NSMC's acquisitions. The lengthy proxy statement for this meeting was to include NSMC's financial statement for the 1968 fiscal year ending August 31, 1968–the latest audited period–and an *unaudited* summary of earnings for the nine-month period from September 1, 1968 through May 31, 1969. The two distinct statements alleged by the indictment to be false and misleading were contained in those two portions of the proxy statement.

1. The Footnote to the Audited Statement of Earnings.

The audited statement of earnings printed in the proxy statement consisted of republished income statements for the preceding fiscal years 1966, 1967, and 1968. NSMC had acquired several companies subsequent to the close of the last period, however, and therefore the statements could not be republished in original form. Statement on Auditing Procedure No. 40 issued by the American Institute of Certified Public Accountants (AICPA) in October 1968 required that any republication of financial statements for pre-acquisition periods reflect the combined operations of NSMC and the acquired companies, as if they had been operating as an integral unit during those periods.[6] The retroactive "pooling" of

[6]The purpose of such a presentation is to make figures for pre- and post-acquisition periods properly comparable, by eliminating the sudden distortion that an acquisition would otherwise introduce into a financial statement. *See* AICPA, Reports Following a Pooling of Interests ¶1 (Statement on Auditing Procedure No. 40, 1968).

NSMC's earnings during pre-acquisition periods with those of its newly-acquired companies resulted in a substantial augmentation of the figures originally reported for those periods. For example, NSMC was reporting in the proxy statement sales and earnings for fiscal year 1968 of $11,541,895 and $773,152, respectively, whereas in its audited statement originally prepared for that year it had reported only $4,989,446 and $338,081, respectively. (Compare Gx. 5 and Gx. 25.) The republished statement for fiscal year 1968 reflected the write-off of the Michaels contracts and the elimination of the deferred tax provision, which was shown separately as an extraordinary credit.

Opinion No. 10 of the Accounting Principles Board of AICPA, then in effect, suggested that in order to show effects of pooling upon earnings trends, the acquiring company "may wish to provide reconciliations of amounts of revenues and earnings previously reported with those currently presented." Petitioner determined early in the course of preparing the financial statement that such a reconciliation, suggested but not required by then authoritative AICPA principles, should be included. A footnote to the audited statement of earnings contained, for both sales and earnings in each pre-acquisition period, a line labelled "originally reported" to show the figure attributable to NSMC as it existed before acquisitions, and a separate line labelled "pooled companies reflected retroactively" to show the addition of data for acquired companies. The sum of entires on the two separate lines equalled the corresponding entry in the financial statement presented in the main text. (Gx.5, p. 23)

As originally drafted by petitioner, the footnote contained an additional line labelled "retroactive adjustment for contract losses," in which petitioner planned to show the write-off of commitments fraudulently reported by Michaels. After reviewing the first printed draft of the proxy statement, which contained this line entry, petitioner determined that such an entry would have to be amplified by narrative discussion. As he attempted to draft an explanation of Michaels' misconduct, petitioner became concerned about the propriety of printing such allegations in a public document and began to question whether separate disclosure of retroactive adjustments to 1968 figures–the write-off of Michaels contracts and of the deferred tax expense–was really necessary at all, since their net effect was a reduction of only $21,000 from originally reported earnings of $388,000 (Tr. 1905-1908.)

Petitioner decided to discuss the matter with Leon Otkiss, a PMM partner who because of his technical proficiency was designated as an "SEC reviewing partner." In his discussion with Otkiss, petitioner questioned the need for separate treatment and narrative discussion of these two adjustments because of the small net effect these items had upon earnings. Petitioner mentioned the improvements in the company's record-keeping practices since the date of the original financial statement and noted that insistence on written commitments should eliminate problems such as the write-off of oral commitments that Michaels had reported. Otkiss agreed with petitioner that in these circumstances the post-period

adjustments had no material impact upon net income and that footnote discussion of the contract write-offs was therefore not necessary.[7] As a result the "adjustment for contract losses" line in the footnote petitioner had drafted was eliminated, and the adjustments for the contract write-offs and the deferred tax provision were simply reflected in the footnote in the figures entered in the line labelled "pooled companies reflected retroactively." (Tr. 1741-1752, 1908-1910.)

The indictment charged that the inclusion of these adjustments in the "pooled companies" line without seperate disclosure constituted a materially false statement in violation of Section 32(a) of the Act, 15 U.S.C. §78ff(a).

[7]The court of appeals, without citing any support in the record, stated that petitioner had sought Otkiss' advice "without full disclosure to Otkiss of all relevant factors." (App. 17a.) This characterization is inconsistent with testimony by Otkiss that *he* asked all questions he thought relevant and that petitioner answered them openly. (Tr. 1771.) On cross-examination Otkiss testified that he "had no recollection" of petitioner's telling him about matters relating to the unaudited statement concerning a later period, discussed *infra* pp. 15-19. (Tr. 1767-1770.) These matters had nothing to do with the footnote to the audited statement on which petitioner sought Otkiss' advice. This testimony, therefore, fails to support the insinuation that petitioner had concealed from his partner any information necessary to make a judgment on the necessity of footnote disclosure or on the propriety of percentage-of-completion accounting, the two matters on which petitioner sought Otkiss' assistance.

2. The Unaudited Statement of Earnings.

The other specification of material falsity related to the inclusion of income from a promotion contract in figures appearing in an ***unaudited*** financial statement for the nine-month period ending May 31, 1969. PMM had not performed an audit with respect to the nine-month figures and these were clearly labelled "unaudited" in the proxy statement. Because those figures would appear in proxy material also containing figures PMM had audited, however, petitioner had a professional obligation to object to any known departures from accepted accounting principles.

Among the items included in the nine-month statement as initially drafted by NSMC's management was a commitment from Pontiac Division of General Motors Corporation involving gross revenue of $1.2 million. The Pontiac commitment originally had been included by NSMC in an unaudited statement of earnings for the first six months of fiscal 1969, published by NSMC in May 1969. Although petitioner was in no way associated with this statement, when he became aware of the entry he advised NSMC's management that the accrual of revenue on this commitment would not be accepted at the time of the fiscal 1969 audit because the supporting letter from Pontiac Division was not in the legally-binding form prescribed by NSMC's general counsel after the December 1968 meeting.[8]

During the course of work on the proxy statement, petitioner went from his office in the District of Columbia to New York City to spend the evening of

[8]*See* p. 8, *supra.*

August 14 reviewing the proxy statement at the offices of NSMC's printer. At that time he insisted upon changes in the figures already set in type to reflect deletion of the Pontiac commitment. NSMC's president Cortes Randell, who was present at the printer's plant, insisted that the Pontiac commitment was firm and offered to fly petitioner to Detroit to meet the Pontiac official involved. Petitioner declined this offer and maintained his prior position that while there was no reason to question the genuineness of the letter, the commitment should not be included in the figures because it was not in the legally binding form prescribed by the company's counsel. (Tr. 515-519, 530-532, 651-653, 672-673, 1913-1919; Gx. 12; Natelli Ex. G.)

At some point during this session, which stretched into the early morning hours of August 15, Randell reminded petitioner of an oral commitment Eastern Airlines had given in May, for which written confirmation had recently been received. Randell suggested that since the two contracts were approximately equal and Eastern's had not been reflected in the figures contained in the printed draft, the Eastern commitment, now confirmed in writing, should be "substituted" for the Pontiac commitment, averting the need to change any of the figures set in type. Despite the unusual hour, Randell arranged for an NSMC account executive to telephone the gross sales and costs anticipated on the Eastern contract. Those figures indicated, however, that NSMC's expected earnings on the Eastern contract were about $200,000 less than those anticipated on the Pontiac commitment. Petitioner concluded that in no event could the figures currently in the draft proxy statement remain unchanged. His decision meant that the entire nine-month statement had to be reprinted.

Before his departure from the printer, petitioner was asked to consider whether, when the statement was revised, the company could include the Eastern contract, since the Eastern letter, in the agreed-upon form, confirmed an oral commitment made in May, during the period covered by the unaudited statement. During the day of August 15, Dennis Kelly, an NSMC vice-president, brought petitioner a copy of the letter signed by the Eastern Airlines Manager of Special Markets, which read in pertinent part:

> This is to confirm our verbal commitment given to you on May 14, 1969.
>
> We will accept and utilize during the fiscal year 1970, an amount of not less than $820,000 for National Student Marketing Corporation's services as offered to us in your proposal originally submitted on May 7, 1969. (Gx 18.)

Kelly also produced a copy of the proposal referred to in the Eastern letter and reviewed with petitioner the costs allocable to the Eastern program. Petitioner left New York on August 15 without having decided whether inclusion of the Eastern contract would be proper. (Tr. 539-544, 677-679, 1919-1928.)

During the following week, petitioner reviewed the time sheets of Robert Bushnell, the NSMC account executive having primary responsibility for the Eastern Airlines account; the records showed that he had spent more than 110 hours on the Eastern program prior to the end of May. Petitioner concluded that accrual of some revenue on the Eastern contract in the unaudited statement would be consistent with percentage-of-completion accounting treatment and accordingly advised NSMC that he would not object to the proposed inclusion. When the unaudited statement was

reprinted to delete revenue attributable to the Pontiac commitment and include that attributable to the Eastern account, the nine-month sales and earnings were \$400,000 and \$200,000 lower, respectively, than the figures that had appeared in the earlier printed draft, to which petitioner had objected.[9] (Tr. 541-544, 680-682, 769-770, 1925-1930; Natelli Ex. J; Gx. 13, p. 2666.)

The indictment alleged that the unaudited nine-month statement had falsely overstated NSMC's sales and earnings. The principal component of the overstatement was said to be the Eastern contract. This was described by government counsel at trial as a "complete phony,"

[9]The key passage in the opinion of the court below on petitioner's alleged mishandling of the Eastern commitment (App. 15a) contains several mistakes about the record. First, the court's view that the Eastern commitment was "substituted" for the Pontiac contract is erroneous because the initial figures that reflected the Pontiac contract were not allowed to stand. While that was the treatment proposed by NSMC's president Randell, the suggestion was rejected by petitioner, and the proxy statement was reprinted with new computations. It was Randell's suggestion to disregard the differences in the figures that petitioner described as "weird," not the Eastern commitment itself as suggested by the court. Notwithstanding the court's characterization of the two commitments as "strangely close in amount," the Eastern contract on its face showed \$227,000 less in earnings for NSMC than had the Pontiac commitment, a difference that necessitated reprinting of the proxy statement to show those lower earnings.

Next, the court's observation that NSMC had "only time logs" but no expenditures and no billing on the program is without significance, since the essence of percentage-of-completion accounting is the accrual of revenue and costs on unbilled sales. Finally, the court's remark that petitioner had seen "not one scrap of paper" from Eastern other than the commitment letter simply ignores the character of the letter itself, which on its face was a binding document in the form approved by counsel.

which appeared "[b]y magic [at] 3 o'clock in the morning." (Tr. 2295.) Significantly, the government never offered any evidence that the Eastern letter examined by petitioner was anything other than what it purported to be–a binding commitment by Eastern to purchase at least \$820,000 of NSMC's services–and, indeed, testimony by the principal government witness in a subsequent, related prosecution showed that the prosecutor had substantially (and apparently knowingly) misrepresented the facts in his presentations to the jury trying petitioner.[10]

E. The Trial and the Instructions to the Jury

The key issues for the jury were whether petitioner had made any false material statements to the SEC, and, if so, whether he had done so "willfully" and "knowingly." With respect to the omission of footnote discussion of the retroactive write-off of the Michaels contracts, petitioner's position was that (1) the contract write-off and the correction of the deferred tax charge

[10]The subsequent testimony and its significance are examined *infra*, pp. 39-45. What is important here is that the government failed to show that the Eastern contract was a fraud–an essential element to sustain this specification. The court below never acknowledged this omission in the government's proof but confined itself to stating that the Eastern contract "was a matter for deep suspicion." (App. 15a.) While we believe this characterization erroneous for the reasons stated in n.9, *supra*, the court's remark shows, at most, that petitioner should have questioned the Eastern contract, not that it was not genuine or that its inclusion rendered the unaudited financial statement false and misleading.

had only a small net effect upon NSMC's 1968 earnings when combined, (2) the retroactive write-off itself seemed traceable to dishonesty of an employee who already had been discharged, and (3) new procedures for obtaining written commitments in binding form seemed likely to prevent recurrence of the situation. Petitioner and Otkiss testified that in these circumstances they believed in good faith that omission of further explanation of the adjustments in the pooled financial statement for fiscal year 1968 was not material. With regard to the Eastern contract that the government described as a "phony," petitioner's position was that whether or not the contract was actually bogus—a point on which the government offered no evidence—he had believed the Eastern contract to be genuine and had no reason to seek verification from the Eastern official who signed the letter, since the financial statement in question was not the subject of an audit, and the letter was in the legally binding form that he would require at the time of the next audit.

The trial judge instructed the jury that a conviction could be returned without a finding that petitioner *knew* of any material inaccuracy in the figures. The court stated that, although "ordinary or simple negligence or mistake alone would be insufficient to support a finding of guilty knowledge or willfulness or intent," the jury could convict if it found "reckless deliberate indifference to or disregard for truth or falsity." (Tr. 2365.) Defense counsel objected to the "recklessness" element of the charge (Tr. 2139-2140, 2427-2429), as well as to the court's failure to explain an independent accountant's duty with respect to an unaudited statement. Notwithstanding the fact that an *unaudited* statement formed the basis of the second specification, and that the court instructed the jury on the outside accountant's duties when conducting an *audit*, the court refused to distinguish that duty from an accountant's professional

obligations with respect to *unaudited* financial statements. (Tr. 2365-2369, 2384.) The Court's instructions on "willful" and "knowing" conduct, and specifically the "recklessness" concept, were discernibly the basis for the jury's verdict.[11]

REASONS FOR GRANTING THE WRIT

Introduction and Summary

This case is part of extensive litigation that has been described by one court as a "turning point" in the exposure of accountants and lawyers to liability under the securities laws.[12] In this "test" prosecution, the government urged that petitioner could be convicted of

[11] After an initial period of deliberation, the jury requested further instruction on the element of "knowing" and "willful" conduct. In his supplementary instructions, the judge told the jury that a conviction was permissible only if petitioner "knew that a portion of the financial statement . . . was false or misleading" and if he had the "intention to include false or misleading information of a material nature. . . . " (Tr. 2400.) This time, however, the court omitted any reference to recklessness as a basis for conviction, despite objection from the government. (Tr. 2401.) After another period of deliberations, the jury reported itself deadlocked. (Tr. 2420.)

When the judge instructed the jury to continue deliberations, the foreman asked him to define "knowingly" again. On this occasion the supplementary charge reintroduced "recklessness" as an adequate basis for conviction, without actual knowledge of material falsity. (Tr. 2426-2428.) After receiving these instructions, the jury brought in a verdict of guilty.

[12] *See SEC v. National Student Marketing Corp.*, CCH Fed. Sec. L. Rep. ¶95,331, n.32 (D. D.C. Oct. 21, 1975), the civil action brought by the SEC against officers and directors of NSMC, NSMC's independent accountants, outside attorneys retained by NSMC, and attorneys serving certain parties with which NSMC transacted business.

"knowingly" and "willfully" filing false financial statements because his purported failure to satisfy what the government contended were his professional obligations constituted "reckless disregard" of the truth. The court below, in affirming the conviction, concluded that petitioner had "willfully" and "knowingly" filed a materially false statement with the SEC by failing to perform "a specific duty to discover the true facts." (App. 22a.) Yet the specific duty the court discerned is not found in any pronouncement of the accounting profession, and the court disregarded a distinction the profession has long recognized as significant–the difference between an independent accountant's *auditing* function and his simple association with *unaudited* financial presentations. Although the court based its affirmance of the conviction upon petitioner's failure to investigate an unaudited financial statement, it approved the jury instructions that dealt exclusively with the auditing function. The court concluded that an accountant's conduct should be measured by jurors' "common understanding" of proper conduct. (App. 24a.)

The decision below also constitutes a novel expansion of the statutory requirement of culpable knowledge–an expansion expressly tied to petitioner's status as a member of one of the "ancient professions [law and accounting]." (App. 21a.) The court concluded that because petitioner had failed to satisfy the obligation of affirmative inquiry created by the court, he could be held to have "willfully" and "knowingly" filed a materially false statement without regard to his actual knowledge or belief. It was sufficient, the court held, if petitioner had acted with "reckless disregard" for the true facts; this was equated with foreknowledge of falsity even without

the accompanying finding, until now universally required in the case of a prohibition of "knowing" and "willful" conduct, that the defendant has acted with at least a *conscious purpose* to remain ignorant. Thus, by coupling its erroneous determination of an accountant's professional responsibilities with its elimination of the requirement of scienter, the court below upheld a conviction despite the district judge's appraisal that petitioner did not have the requisite intent. The judge stated at sentencing:

> . . . I think *you are absolutely sincere when you say that you do not believe that you did anything wrong* in this audit or audits for National Student Marketing. After thinking about the matter for a long time I think you honestly mean that. But the tragedy is that the jury found that this was an *audit or audits done with reckless disregard for what was really involved.* We know that because of the record showing what it did in the jury deliberation. (S. Tr. 12) (Emphasis added.)[13]

The decision to hold accountants, under threat of criminal prosecution, to virtually the same duty of verification in connection with unaudited financial statements that heretofore has been applied only when accountants certify financial data, is one that obviously

[13]A sentence of one year in prison plus a $10,000 fine was imposed, with all but sixty days of the prison sentence suspended. Despite the fact that the trial judged acknowledged that in 13 years as a trial judge he had not dealt with any person "more generally reputable, and deservedly so," than petitioner (S. Tr. 12), the judge stated he was imposing a prison sentence "because I think the profession of accountancy has failed just as badly as some aspects of the legal profession have failed in understanding their professional responsibility." (*Id.*)

will have broad impact upon the accounting profession. The abandonment of authoritative professional pronouncements in favor of the "common understanding" of lay jurors as the standard for measuring an accountant's conduct is a matter that warrants considered review by this Court. The decision below takes on added significance because the vehicle for enhanced discipline of professionals is a criminal statute, and the discipline has been imposed by a weakening of the requirement of a culpable state of mind. The determination of the degree of *mens rea* necessary to support criminal conviction under regulatory statutes has long been regarded as a judgment for this Court to make.[14] This case is one of special significance because the court below has carved from a statute of general applicability a special exception to the *mens rea* requirement applicable only to professionals.

A grant of certiorari is particularly appropriate because the Court has before it *Ernst & Ernst v. Hochfelder*, No. 75-1042, in which the Court is asked to consider whether an accountant's negligence in preparing financial statements is sufficient to bring *civil* liability under the securities laws. However that question may be resolved, the Court should grant review in this case to reaffirm that only "knowing" falsehood warrants the imposition of criminal sanctions and that where statements are made in ignorance of true facts only a

[14] *See e.g., United States v. Murdock*, 290 U.S. 389 (1933); *United States v. Balint*, 258 U.S. 250 (1922); *Sansone v. United States*, 380 U.S. 343 (1965); *United States v. International Minerals & Chemical Corp.*, 402 U.S. 558 (1971); *United States v. Bishop*, 412 U.S. 346 (1973); *Feola v. United States* ____ U.S. ____ (No. 73-1123, Mar. 19, 1975); *United States v. Park*, ____ U.S. ____ (No. 74-215, June 9, 1975).

conscious purpose to avoid learning the truth can possibly justify treating the statements as the predicate for a *criminal* conviction.

This case also presents other issues of importance for the integrity of federal criminal justice. These involve the appellate court's approval of inadequate jury instructions on the constitutional requirement of unanimity, and the sustaining of venue in a district other than the one in which the allegedly false statement was required to be, and was, filed. Finally, events since the affirmance of this conviction by the court below strongly indicate that the government procured the conviction by misconduct; these developments are serious enough to warrant summary action by this Court.

I.

THE DECISION BELOW OBLITERATES THE WIDELY ACCEPTED PROFESSIONAL DISTINCTION BETWEEN AUDITED AND UNAUDITED FINANCIAL STATEMENTS.

The affirmance of petitioner's conviction is premised upon the court's conclusion that he "recklessly" defaulted on his alleged professional obligations by a failure to confirm the Eastern contract through communication with Eastern officials. (App. 22a-23a) This decision draws into question what has been the long held and widely accepted principle in the accounting profession that an accountant's responsibilities in dealing with unaudited figures are not as extensive as those relating to an audit. The Eastern contract appeared in what was clearly labelled as an *unaudited* presentation. The significance of this fact largely eluded the trial court, which

instructed the jury on auditing but refused petitioner's requested instruction on the scope of an accountant's professional obligations when working with unaudited statements. The court of appeals affirmed the conviction notwithstanding the absence of *any* jury instruction distinguishing audited from unaudited statements; and in an opinion which confused the two kinds in explaining the professional standards established by AICPA, the court adopted a theory of professional obligation—the breach of which it held may carry criminal liability—that compels accountants to ignore the distinction.

When conducting an audit, the accountant is expected to go beyond company records, as, for example, by observing inventories or by communicating directly with customers of the audited company. *See* 1 CCH AICPA Professional Standards § 331. With respect to unaudited statements, however, the profession has recognized that the accountant's duty is more limited. The AICPA Standards, which govern the professional conduct of certified public accountants, flatly state that:

> The certified public accountant has no responsibility to apply any auditing procedures to unaudited financial statements. 1 CCH §516.02.

When an accountant becomes "associated" with an unaudited financial presentation,[15] AICPA Standards prescribe his obligations as follows:

> [I]f the certified public accountant concludes on the basis of facts known to him that unaudited financial statements with which he may become associated are *not in conformity to generally accepted principles,* which include adequate disclosure, he should insist . . . upon appropriate revision. . . . §516.06 [emphasis added].

[15]An accountant becomes "associated" with unaudited presentations if he assists in their preparation, or if he permits his name to be used elsewhere in a document containing them. 1 CCH §§516.03, 516.11, & 516.12.

The SEC Accounting Rules themselves distinguish audited and unaudited statements and provide that with respect to unaudited data an accountant must follow "appropriate professional standards." SEC Reg. 210.2-02(e) *as amended,* 4 CCH Fed. Sec. L. Rep. ¶69,128A (1975). In the case of NSMC's unaudited nine-month statement petitioner assured himself that the company's records supported accrual of the income included, consistent with percentage-of-completion accounting principles. He refused to permit recognition of income on the Pontiac commitment because the letter supporting that commitment was not in legally binding form. But the Eastern contract was acceptable because the supporting letter evidencing that commitment was in the legally binding form prescribed by NSMC's counsel.

In affirming this conviction, the court below concluded, citing the AICPA Standards, that petitioner had failed to satisfy professional obligations by his failure to take the additional step of communicating with Eastern. (App. 16a-17a.) But, as demonstrated, nothing in the "generally accepted principles" applicable to unaudited statements required petitioner to verify the genuineness of company records that were in the proper form.[16]

[16]Since the court of appeals relied heavily upon that specification regarding the Eastern contract, we reiterate that the Government introduced no evidence to show that the Eastern contract was not genuine. Furthermore, if petitioner had done what the court found he had crucially failed to do—communicate with Eastern about the commitment—he would not have discovered any defect in the apparently binding contract. See pp. 39-45 *infra*.

The court below not only misinterpreted existing pronouncements of the profession, but abandoned them entirely by approving jury instructions that focused exclusively on auditing and failed to differentiate the accountant's more limited responsibility in connection with unaudited presentations.[17] Ultimately, the court concluded, petitioner's conduct was to be judged according to the "common understanding" of the jury about what constitutes legitimate behavior for a professional accountant.

Quite apart from the unfairness of convicting an accountant found to have violated this "common understanding" by actions that conformed to authoritative professional standards at the time he acted, the prospective impact of this decision upon accounting practice will be substantial and adverse. Faced with the court's vague standard of conduct enforced by criminal sanction, a professional accountant must observe auditing procedures even when dealing with unaudited statements. The result, however, will be a loss of the benefits unaudited statements provide for the financial community.

Companies publishing audited financial statements often include unaudited "interim statements" summarizing the company's earnings record from the close of the audited period to the date of publication. Because adherence to auditing procedures often means that the audited statements must follow by several months the close of the audited period, these unaudited interim statements are viewed as helpful to investors, even without an auditor's certification, since they make more current the picture of the firm's financial status. Indeed, the SEC has moved to expand the inclusion of interim financial data in annual financial statements filed with it. *See* Accounting Series Release No. 177, 5 CCH Fed. Sec. L. Rep. ¶72,199 (September 10, 1975). Interim statements cannot, however, serve the function of making audited statements more current if accountants must follow full audit procedures or suffer criminal liability for what later may be found to have been a "reckless" failure to seek additional information concerning an unaudited presentation.

If Section 32(a) of the Securities Exchange Act compels accountants, despite general professional practice, to treat all associations with financial presentations as demanding the same degree of involvement and scrutiny—or to risk conviction of a federal felony—such a departure from accepted accounting practice that is as old as the statute itself should be mandated uniformly and authoritatively by this Court.

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[17] The court of appeals concluded that the instruction requested by petitioner was not proper. (App. 24a.) Any deficiency in the proffered instruction, however, did not justify the trial court's refusal, after instructing the jury on an *auditor's* responsibility, to add *any* remarks distinguishing *unaudited* statements. This omission was specifically noted by defense counsel in compliance with Fed.R.Cr.P.30. (Tr. 2384.)

The distinction between audited and unaudited presentations has been applied in civil suits against accountants in the district courts, *see, e.g., Fischer v. Kletz,* 266 F. Supp. 180 (S.D.N.Y. 1967); *Gold v. DCL Inc.,* 1973 CCH Fed. Sec. L. Rep. ¶94,036 (S.D.N.Y. 1973), but the decision below dealing with criminal liability casts doubt upon whether the distinction will continue to receive judicial recognition.

II.

THE COURT OF APPEALS HAS WEAKENED THE REQUIREMENT OF SCIENTER ASSOCIATED WITH THE PROSCRIPTION OF "KNOWING" AND "WILLFUL" CONDUCT.

The court below concluded that because petitioner had failed to perform a duty to inquire further into the Eastern contract, he had acted with "reckless indifference" to the true facts, and that this amounted to "knowing" and "willful" false statement of material facts. Even if the court's initial premise that petitioner had an obligation to inquire further is accepted—a position untenable unless one rejects the generally accepted professional standards prevailing prior to the decision below—it is plain that the court's conclusion involves a novel departure from the usual concepts of criminal culpability.

In Section 32(a) of the Securities Exchange Act, Congress has sought to criminalize only "knowing" and "willful" falsehood; the making of an erroneous statement in ignorance of the facts can be held criminal only if the defendant has consciously closed his eyes to the truth. As the Third Circuit has noted, "[o]nly a finding of a *conscious purpose* to avoid enlightenment will justify charging the defendant with knowledge." *United States v. General Motors Corp.*, 226 F.2d 745, 749 (3d Cir. 1955). A conscious, purposeful refusal to recognize the truth may lay the foundation for a finding that the accused really did know, *see United States v. Jewell*, ____ F.2d ____ (9th Cir. No. 74-2832, Feb. 26, 1975), or it may permit the conclusion that he "de-

liberately chose not to learn for the very purpose of being able to assert his ignorance if discovered," *United States v. Olivares-Vega*, 495 F.2d 827, 830 n.10 (2d Cir. 1974). In either case, the finding of a conscious purpose to avoid learning the truth is necessary to establish that the defendant acted with the consciousness of wrongdoing which the elements "knowingly" and "willfully" require.[18] *Morisette v. United States* 342 U.S. 246, 264-65 (1952); compare *United States v. Park*, ____ U.S. ____ (No. 74-215, June 9, 1975). Only recently, indeed, a different panel of the same court that affirmed petitioner's conviction reversed the conviction of a defendant charged

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[18]Other federal statutes proscribing "knowing" and "willful" conduct have been so construed by the courts of appeals. *E.g.*, 21 U.S.C. § 960(a), knowingly violating narcotics control laws, *see United States v. Zapata*, 497 F.2d 95, 97 n.5 (5th Cir. 1974); *United States v. Joly*, 493 F.2d 672, 674-675 (2d Cir. 1974); *Verdugo v. United States*, 402 F.2d 599, 604 (9th Cir. 1968) *cert. denied* 402 U.S. 961 (1971); *Griego v. United States*, 298 F.2d 845, 849 (10th Cir. 1956).

18 U.S.C. §922(a)(6), knowingly making false statements in connection with acquisition of a firearm, *see United States v. Thomas*, 484 F.2d 909 (6th Cir. 1973), *cert. denied* 415 U.S. 924 (1973); *United States v. Squires*, 440 F.2d 859, 864 n.12 (2d Cir. 1971).

18 U.S.C. §1001, knowingly making false statements in a matter before a federal department or agency, *see United States v. Sarantos*, 455 F.2d 877 (2d Cir. 1972); *United States v. Clearfield*, 358 F. Supp. 564 (E.D. Pa. 1973).

18 U.S.C. §2314, knowing transportation of stolen property, *see United States v. Brawer*, 482 F.2d 117, 128 n.14 (2d Cir. 1973); *United States v. Jacobs*, 472 F.2d 270, 287 & n.37 (2d Cir.), *cert. denied* 414 U.S. 821 (1973).

See also United States v. Ottley, 509 F.2d 667, 672-673 (2d Cir. 1975) (willful violation of fiduciary duty imposed by

with knowing possession of stolen mail matter, 18 U.S.C. § 1708, because of the trial judge's failure to include the requirement of a "conscious purpose" when instructing that a "reckless disregard" for the truth would suffice to convict. *United States v. Bright,* 517 F.2d 584 (2d Cir. 1975).

In this case, however, according to the decision below, petitioner's status as a professional accountant caused the requirement of conscious purpose to vanish. This construction of Section 32(a), which the court made no pretense of supporting by the language or legislative history of the statute, introduces a serious distortion in federal prosecutions of "knowing" and "willful" conduct. While a citizen who obtains goods under circumstances indicating a high probability that they are stolen but remains ignorant of their true character may be convicted only upon a finding that he acted with a conscious purpose to avoid learning the truth, a professional accountant will more readily suffer a felony conviction if a jury later concludes that he was confronted with suspicious figures.[19] Congress, however,

LMRDA, 29 U.S.C. §439(a)); *Walters v. United States,* 256 F.2d 840 (9th Cir.) *cert. denied* 358 U.S. 833 (1958) (willful violation of Securities Act of 1933, 15 U.S.C. §77x); *Forster v. United States,* 237 F.2d 617, 620-621 (9th Cir. 1956) (willful and knowing evasion of income tax, § 145(b) of Internal Revenue Code of 1939).

[19] Indeed, the decision below causes a further distortion in that professionals will be more readily subject to criminal sanction than the businessmen who retain them. The indicted officers of NSMC, had they gone to trial, would have been entitled to instructions stating that "knowing" conduct consists at least of *conscious* disregard of the truth. The ample evidence available from related litigation, showing that NSMC's officers

has done nothing that would justify such a novel and discriminatory application of Section 32(a), and it is not for the courts to change the statutory standard of criminal liability in order to impose upon professionals a higher standard of care.

III.

THIS CASE PRESENTS AN IMPORTANT ISSUE OF SOUND JUDICIAL ADMINISTRATION TO ASSURE UNANIMOUS VERDICTS.

The indictment contained, in a single count, two distinct specifications against petitioner, one involving the footnote to the audited statement of earnings and the other concerning the Eastern contract reflected in the unaudited statement for a later period. The trial judge charged the jury that it could convict upon finding that the proxy statement was false in either respect charged. Defense counsel asked the court to advise the jurors that they must be unanimous as to *which* of the two specifications, if either, established a violation of the statute. This request was refused.[20]

were engaged in a variety of fraudulent conduct with the objective of deceiving the accountants, demonstrates the impropriety—and the injustice—of subjecting petitioner to a harsher standard of criminal responsibility.

[20] The trial judge charged that "if you find that the proxy statement was false in either one of these two respects, that is sufficient to support a conviction." (Tr. 2340.) Much later in the charge, the judge included the general admonition that the "verdict" had to be unanimous. (Tr. 2380.)

The failure of the trial court to give the requested charge created a substantial risk that the requirement of unanimity was not satisfied; the jurors might have agreed that the government had proved *one* specification of the indictment beyond a reasonable doubt, but disagreed as to which. This risk is particularly acute because of the state of the evidence, which even the court below found at most marginally sufficient. The court of appeals acknowledged that it would have been "sound practice" to instruct the jury as petitioner had requested, but was nevertheless content to assume that a general admonition that the "verdict" must be unanimous "suffices to instruct the jury that they must be unanimous on whatever specifications they find to be the predicate of the guilty verdict." (App. 26a-27a)

Unanimity of jury verdicts in federal prosecutions is compelled by the Sixth Amendment and is specifically commanded by Rule 31(a) of the Federal Rules of Criminal Procedure. See *Johnson v. Louisiana,* 406 U.S. 356, 369-371, (Powell, J.), 382-384 (Douglas, J.), 395 (Brennan, J.), 397-399 (Stewart, J.), 400-401 (Marshall, J.) (1972). The requirement of unanimity "extends to all issues–character or degree of the crime, guilt and punishment–which are left to the jury." *Andres v. United States,* 333 U.S. 740, 748 (1948).

This constitutional requirement was substantially diluted in the present case, for the meaning of the requirement as it affects the jury's decision-making process was not explained. Where the government's several factual theories are embodied in separate counts of an indictment, the necessity of delivering a separate verdict on each count insures that the jurors agree on each evidentiary path to conviction. The indictment in this case offered no such protection, since two specifications were contained in the same count. Moreover,

because the two specifications did not relate to the same statement alleged to be false – one concerned an audited presentation, the other an unaudited statement for a different period – there was no assurance that a juror's finding with respect to one specification implied a similar finding on the other.

In these circumstances, when the jury was told that the government need prove only one specification to prevail, the trial judge's admonition that "your verdict must be unanimous" was insufficient. It directed the jury's attention to unanimity of *result,* but simply failed to explain that unanimity means agreement about the basic facts on which the ultimate conclusion is grounded.

The requirement of unanimity in federal criminal verdicts is too important to become merely a symbol, whose specific meaning for the jury's deliberations is left undefined. This Court should grant review in order to establish a uniform principle for the effective implementation of the unanimity requirement of the Sixth Amendment and Federal Criminal Rule 31(a).

IV.

BY EXPRESSLY CONFINING "TO THE FACTS" THIS COURT'S DECISION IN *TRAVIS v. UNITED STATES,* 364 U.S. 631 (1964), AND IN SUSTAINING VENUE THE COURT OF APPEALS OVERSTEPPED ITS BOUNDS AND CREATED AN INTER-CIRCUIT CONFLICT ON THE PROPER INTERPRETATION OF *TRAVIS.*

Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa, provides that criminal proceedings

involving alleged violations of the Act are to be brought in the district where "any act or transaction *constituting the violation* occurred" [emphasis added]. The indictment, tracking the language of Section 32(a), 15 U.S.C. §78ff(a), charged petitioner with having made materially false statements in a proxy statement "required to be filed" with the SEC. While it is undisputed that the statement was filed with the SEC at its offices in Washington, D.C. (where petitioner had his office as well), the prosecution was brought in the Southern District of New York, where certain steps in the preparation of the proxy statement occurred. But the offense charged had occurred, if at all, where the statement was filed with the SEC, and the act "constituting the violation" of Section 32(a) occurred at the SEC's offices in Washington. Petitioner, therefore, moved the trial court to dismiss on the ground that under Section 27 venue properly lay only in the District of Columbia. The trial judge denied the motion, and the court of appeals affirmed.

While this Court has never construed the venue provisions of Section 27, it has had occasion to consider the situs of an offense analogous to the one with which petitioner was charged. In *Travis v. United States*, 364 U.S. 631 (1964), this Court considered the proper venue for a prosecution under a similar statute, the False Statements Act, 18 U.S.C. §1001, which punishes the making of a false statement "in any matter within the jurisdiction of any department or agency of the United States." The statement there was an affidavit of non-Communist affiliation, prepared in Colorado and filed with the National Labor Relations Board in

Washington, D.C. pursuant to then section 9(h) of the National Labor Relations Act, which provided that the Board could not investigate any complaint filed by a union "unless there is on file with the Board" such an affidavit from each union officer. Emphasizing that the underlying regulatory statute, section 9(h), did not itself require the filing of a statement but simply conditioned Board action upon its having been filed, this Court held that there would be no violation of the False Statements Act until the allegedly offending affidavit was actually filed with the Board and, accordingly, that venue for such an offense lay only in the District of Columbia, where the filing had occurred.

The *Travis* holding clearly controls the instant prosecution. Like the filing of the affidavit in *Travis*, the submission of NSMC's proxy statement to the SEC was only required indirectly. While there is no affirmative obligation to file a proxy statement with the Commission, proxies may not lawfully be solicited until a statement is on file. Securities Exchange Act, Section 14(a), 15 U.S.C. § 78n(a); SEC Reg. 240.14a-6. As in *Travis*, any false statement was made, if at all, when the document containing it was filed, and the place of filing then fixed the venue for prosecution.

In refusing to follow the plain command of *Travis*, the court of appeals expressed the view that that decision was "surely meant to be confined to the facts based upon the unusual statute involved."[21] (App. 30a.) The

[21]Purporting to distinguish *Travis*, the court of appeals observed that while the filing of the union affidavit was a jurisdictional prerequisite for certain NLRB action, the filing of a proxy statement is "part of the continuous process of the

principles of *Travis* have been respected by other courts, however. Only recently a decision of the Court of Appeals for the District of Columbia Circuit construed Section 27 of the Securities Exchange Act in line with *Travis* in determining proper venue for a civil suit brought by the SEC. *See Investors Funding Corp. v. Jones*, 495 F.2d 1000, 1001-1003 (D.C. Cir. 1974).[22] Insofar as the decision below limits *Travis* to its facts, it is in conflict with that decision of another circuit. A determination that a decision of this Court should be confined to its

solicitation of proxies." (App. 30a) These remarks have no analytical significance. Petitioner was not charged under the provisions of the securities laws forbidding the making of false or misleading statements to investors, *e.g.* 15 U.S.C. § 77q, or unlawful solicitation of proxies, 15 U.S.C. § 78n, but with making a false statement in a document "required to be filed" with the SEC. The provisions of § 32(a) charged here are concerned with the accuracy of information filed with a government agency and are clearly comparable to the provisions involved in *Travis*.

The court of appeals also considered it "paradoxical" that petitioner is pressing for venue in the District of Columbia when other defendants, not living and working in Washington, would rather be tried in "their home districts" (App. 30a, n.17). The venue question here pertains to a relatively distinct class of "false filing" charges, and if a defendant considers the District of Columbia an unfavorable forum he can either waive any objection to bringing an indictment elsewhere or seek a change of venue out of the District of Columbia pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure.

[22] *Investors Funding* held that in light of *Travis* and *United States v. Lombardo,* 241 U.S. 73 (1916), a civil action alleging late filing of reports to the SEC required by Sections 13(a) and 15(d) of the Securities Exchange Act, 15 U.S.C. § § 78m(a) and 78o(d), could be brought in the District of Columbia. While the lawsuit was civil in nature, the court was construing and applying the same language in the venue provision of the Act, Section 27, that governs the instant prosecution.

facts ought not to be usurped by a lower court. Review by this Court is especially urgent now that two courts of appeals have disagreed as to whether *Travis* has application to securities act violations.

V.

PETITIONER WAS DEPRIVED OF A FAIR TRIAL WHEN THE GOVERNMENT WITHHELD CRUCIAL FACTS AND MADE AFFIRMATIVE MISREPRESENTATIONS TO THE JURY.

The government asserted throughout petitioner's trial that the Eastern commitment letter had been a fabrication devised by the participants in the August 14 meeting at NSMC's printer. For example, government counsel argued to the jury in summation:

> "If anything has been proved in this case, ladies and gentlemen, the Government submits that you must have been satisfied beyond any doubt that that Eastern contract was known to be a complete phony when it came up.
>
> "The fact is this has to be one of the most cynical events that you will probably ever hear about, at 3 o'clock in the morning at the printers plant where they are printing up this very proxy statement, there's going to be a big hole in the earnings because the Pontiac contract has to come out.
>
> "By magic 3 o'clock in the morning the first time it is mentioned the Eastern Airlines contract comes up. It is supposed to be a contract for the period which ended two months before and yet in the two months between May and August nobody seems to

have peeped a word [about] it to the controller of National Student Marketing or anybody else who had any business with this matter."[23]

Counsel's assertion that the existence of the Eastern commitment was fabricated that evening by the participants in the meeting has been directly contradicted by the government's own proof in a related prosecution brought only after petitioner's conviction was obtained. Less than a month after the jury found petitioner guilty, the government indicted Thomas Mullen, the Eastern Airlines executive who signed the commitment letter, charging him, *inter alia,* with conspiring with NSMC's officers to deceive NSMC's independent accountants. Cortes Randell, formerly NSMC's president, who had pleaded guilty prior to petitioner's trial but had not been called by the government to testify there, appeared as the principal government witness in Mullen's trial on October 14, 1975. There Randell testified that, sometime prior to the day on which they went to the printers, petitioner had told him that the Pontiac figures could not be included in the nine-month unaudited statement of earnings. Randell then explained:

> I then asked the account executives if any of them knew of other contracts which were pending which we could put on our books and Dennis Kelly said that–

[23]Government counsel made comparable remarks in his opening statement, asserting that "[N]obody but nobody had mentioned this enormous sale, virtually the same size as the Pontiac contract, between May and August." (Tr. 56).

* * *

Q. What did Dennis Kelly say to you?

A. He said *he had been working on a contract with Eastern for a number of months and he felt as though it was at the point that he could get a commitment letter on that.* He didn't know, but he would see if he could.

* * *

Q. Did Kelly say anything else to you?

A. Yes, he said that Bob had been working with Tom for a number of months.

Q. Bob who?

A. Bob Bushnell [the NSMC account executive in charge of the Eastern account].

Q. And Tom who?

A. Tom Mullen and at that time, as I recollect, Eastern was our biggest client the previous year and for the coming year they had been working two or three months on a large program.

* * *

Q. Mr. Randell, at the time you had this conversation with Dennis Kelly or prior to that, did you know of any commitment from Eastern Airlines to spend $800,000 with National Student Marketing in 1970?

* * *

A. No, other than, as I know, other than the fact that *Mr. Mullen had agreed to the program,* but that is all. *That is all that I knew. That Mr. Mullen had agreed to go ahead with the program back in May.*

Q. Who told you this?

A. *Kelly had told me this a couple of months previously or Bob, one or the other, Bob Bushnell or Dennis Kelly.*

* * *

Q. What happened after you had this conversation with Kelly?

A. Kelly came back and said that he could get a commitment letter.

* * *

Q. What happened next?

A. He brought one into my offices and again just within the same day or the next day.

* * *

[Tr. 46-54, *United States v. Mullen* (S.D. N.Y. 74 Crim. 172)]

Randell's testimony in the subsequent prosecution supports the representations made to petitioner at the August 14 meeting–that NSMC executives had expended substantial resources on an Eastern proposal for several months and had obtained an oral commitment from Mullen in May–facts also supported by the workpapers delivered to petitioner the following day.[24] Randell's testimony demonstrates clearly that the prosecutor misstated the facts at petitioner's trial when he made the inflammatory argument to the jury that the Eastern commitment was a mythical construct that had first appeared "by magic [at] 3 o'clock in the morning" and that no responsible NSMC official had previously "peeped a word" concerning it.

Moreover, the circumstances strongly support an inference that the misstatements were deliberate. Randell pleaded guilty to conspiracy and fraud counts of the multi-count indictment in August 1974, and subsequently appeared before the grand jury in September and October 1974, before petitioner's trial began. Mullen was indicted in December 1974, less than a month after

[24] *See* pp. 17-19 *supra.*

petitioner's conviction. The assistant U.S. attorney who prosecuted petitioner was in charge of the entire investigation relating to NSMC, including the grand jury appearances of Randell, Kelly, and Mullen and the acceptance of guilty pleas from four NSMC officers, including Randell and Kelly. It is virtually certain, therefore, that he was aware, as Randell was later to testify as a government witness, that the Eastern commitment had in fact been given orally in May and that petitioner was testifying truthfully when he stated at the trial that Randell had told him, earlier in August, that written confirmation of an oral commitment from Eastern was expected. In any event, quite apart from the likely personal knowledge government counsel must have had as to the falsity of his opening and closing arguments the prosecution is chargeable with awareness of the evidence within its possession–evidence that directly contradicted by the version of key facts the government urged upon the jury. *See Giglio v. United States,* 405 U.S. 150, 154 (1972).

By failing to bring out all the facts surrounding the Eastern contract, the government was able to mislead the jury, and the court of appeals, into believing that if petitioner had sought confirmation of the Eastern contract by communication with Mullen, he would have discovered the falsity of that commitment. Randell's testimony at the Mullen trial, however, established that the commitment letter shown to petitioner was not binding only because of a secret side letter Randell gave Mullen simultaneously, making the "commitment" cancellable at will. The prosecution understandably chose

not to offer any proof of the secret side letter in support of the prosecutor's otherwise barren assertion that the Eastern contract was a "phony" and known to be bogus by petitioner. The revelation that Mullen and Randell had concealed the sham character of the transaction from NSMC's accountants would have devasted the government's contention at trial that petitioner had knowingly and willfully assisted NSMC's officers in distorting NSMC's financial condition. But by omitting any proof of the side letter, the government failed to show that the commitment letter Mullen signed was not binding. Accordingly, there was nothing in the government's case to show that the inclusion of Eastern in the unaudited statement of earnings rendered it "false," an essential element of the offense with which petitioner was charged. The government attempted to cover this gaping hole in its proof by asserting in counsel's argument a version that even its own witness now contradicts. Such conduct to procure a conviction certainly offends the dignity of the United States and petitioner's right to fair treatment. *Berger v. United States,* 295 U.S. 78, 88 (1935).

Exposure of all the facts concerning the Eastern contract shows that the key assumption made by the court below in affirming the conviction was untenable. The court of appeals concluded that petitioner's failure "to take the next step of seeking verification from Eastern" (App. 22a-23a) was chargeable as a knowing misstatement, the implicit assumption being that if petitioner had taken that step he would have discovered the "commitment" to have been a "phony." Yet the complete account of Mullen's duplicity shows the utter fallacy of this supposition: had petitioner made the additional inquiry the court below demanded, Mullen

would have provided the necessary confirmation–as indeed he did a short time later in connection with petitioner's *audit* of the 1969 figures.

It is settled law that the government deprives the defendant of a fair trial when it knowingly uses perjured testimony to convict, *see Mooney v. Holohan,* 294 U.S. 103 (1935), or selectively elicits testimony from a witness so that the jury is deliberately left with a "false impression." *Alcorta v. Texas,* 355 U.S. 28, 31 (1957). Indeed the prosecution's obligation to insure the fairness of the trial extends further, to the duty to correct a known misstatement of a witness, *Napue v. Illinois,* 360 U.S. 264 (1959), and to disclose evidence favorable to the accused, *Brady v. Maryland,* 373 U.S. 83 (1963). The government's conduct in this case, withholding from the jury the complete account of the Eastern contract and affirmatively misstating the actual facts in counsel's argument, is as antithetical to a fair proceeding as the actions this Court has previously condemned.

While the government's failure to prove the falsity of the Eastern contract was a point raised on petitioner's appeal to the court of appeals, the evidence of the government's misconduct was not fully revealed until Randell testified in the Mullen trial, while petitioner's petition for rehearing was pending in the court of appeals.[25] Accordingly, petitioner's contentions are properly cognizable by this Court and warrant summary action. *Ring v. United States,* ____ U.S. ____ (No. 73-6969, Nov. 11, 1974).

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[25]Petitioner promptly advised the court of appeals of the substance of Randell's testimony by letter dated October 28, 1975. The petition for rehearing was denied without comment on November 5.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 5, 1975

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1035 & 1036—September Term, 1974.

(Argued April 10, 1975 Decided July 28, 1975.)

Docket Nos. 75-1004, 75-1008

UNITED STATES OF AMERICA,

Appellee,

against

ANTHONY M. NATELLI and JOSEPH SCANSAROLI,

Defendants-Appellants.

Before:

HAYS, MULLIGAN and GURFEIN,

Circuit Judges.

Appeal from judgments of conviction entered after a jury verdict in the United States District Court for the Southern District of New York, Harold R. Tyler, *J.*, finding appellants, two accountants, guilty on a single count of violating 15 U.S.C. § 78ff(a) by making materially false statements in a proxy statement filed with the Securities Exchange Commission.

Held: As to Natelli, the evidence was sufficient to support the conviction and no errors of law were made. As to Scansaroli, the evidence with regard to one of the two specifications in the count was insufficient to show that he had failed to fulfill a duty arising from his position.

Affirmed in part; reversed and remanded in part.

JOHN S. MARTIN, JR., New York, N.Y. (Martin, Obermaier & Morvillo, Philip A. Lacovara and Betty J. Santangelo, New York, N.Y., and Hughes, Hubbard & Reed, Washington, D.C., of counsel), *for Defendant-Appellant Natelli.*

CHARLES A. STILLMAN, New York, N.Y. (Morrison, Paul, Stillman & Beiley, Peter H. Morrison, Benjamin Zelermyer and Edward D. Tanenhaus, New York, N.Y., of counsel), *for Defendant-Appellant Scansaroli.*

FRANKLIN B. VELIE, Assistant United States Attorney, New York, N.Y. (Paul J. Curran, United States Attorney, and Jed S. Rakoff, Audrey Strauss and John D. Gordan, III, Assistant United States Attorneys, of counsel), *for Appellee.*

VICTOR M. EARLE, III and CAHILL GORDON & REINDEL (Howard J. Krongard, William E. Hegarty, Mathias E. Mone, George Wailand, of counsel), for Peat, Marwick, Mitchell & Co. as *Amicus Curiae.*

CRAVATH, SWAINE & MOORE, New York, N.Y. (John R. Hupper, Robert Rosenman and J. Barclay Collins, New York, N.Y., of counsel), for American Institute of Certified Public Accountants as *Amicus Curiae.*

GURFEIN, *Circuit Judge:*

Anthony M. Natelli and Joseph Scansaroli appeal from judgments of conviction entered in the United States District Court for the Southern District of New York on

December 27, 1974 after a four week trial before the Hon. Harold R. Tyler and a jury. Judge Tyler imposed a one year sentence and a $10,000 fine upon Natelli, suspending all but 60 days of imprisonment, and a one year sentence and a $2,500 fine upon Scansaroli, suspending all but 10 days of the imprisonment.

Both appellants are certified public accountants. Natelli was the partner in charge of the Washington, D.C. office of Peat, Marwick, Mitchell & Co. ("Peat"), a large independent firm of auditors, and the engagement partner with respect to Peat's audit engagement for National Student Marketing Corporation ("Marketing"). Scansaroli was an employee of Peat, assigned as audit supervisor on that engagement.

Appellants were charged and tried only on Count Two of a multi-count indictment against other defendants connected with Marketing.

Count Two of the indictment charged that, in violation of Section 32(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78ff(a),[1] four of Marketing's officers and the appellants, as independent auditors, "wilfully and knowingly made and caused to be made false and misleading statements with respect to material facts" in a proxy statement for Marketing dated September 27, 1969 and filed with the Securities Exchange Commission (SEC) in accordance with Section 14 of the 1934 Act, 15 U.S.C. § 78n.

1 Section 32 provides in relevant part:

"Any *person . . . who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder* or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, *which statement was false or misleading with respect to any material fact,* shall upon conviction be fined not more than $10,000, or imprisoned not more than two years, . . ." (Emphasis added.)

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The proxy statement was issued by Marketing in connection with a special meeting of its stockholders to consider *inter alia* a charter amendment increasing its authorized capital stock and the merger of six companies, including Interstate National Corporation ("Interstate") into Marketing.

Count Two of the indictment further charged that appellants, in attempting to reconcile net sales and earnings as originally reported in the annual report for the fiscal year ending August 31, 1968 with the amounts shown in the statement of earnings in the proxy statement, filed less than a year later, created an explanatory footnote that was materially false and misleading.[2] It was alleged that "as the defendants well knew but failed to disclose . . . (a) approximately one million dollars, or more than 20%, of the 1968 'net sales originally reported' had proven to be nonexistent by the time the proxy statement was filed and had been written off on [Marketing's] own internal books of account; (b) net sales and profits of 'pooled companies reflected retroactively' were substantially understated; and (c) net sales and profits of [Marketing] were substantially overstated."

2 The footnote read in relevant part:

"Net sales and earnings as originally reported to stockholders in the annual report [for the year 1968] and the amounts as shown in the statement of earnings in this proxy statement are reconciled as follows:

	1968
Net sales	
Originally reported	$ 4,989,446
Pooled companies reflected retroactively	6,552,449
Per statement of earnings	$11,541,895
Net earnings	
Originally reported	$ 388,031
Pooled companies reflected retroactively	385,121
Per statement of earnings	$ 773,152"

Count Two charged further that the proxy statement also contained an unaudited statement of earnings for the nine months ended May 31, 1969 which was materially false and misleading in that it stated "net sales" as $11,313,569 and "net earnings" as $702,270, when, in fact, as the defendants well knew, "net sales" for the period were less than $10,500,000 and Marketing had no earnings at all.

In order to understand the theory of the government's case, we must retrace our steps to the beginning of the Peat engagement at Marketing. The jury could permissibly have found the following facts.

Marketing was formed in 1966 by Cortes W. Randell. It provided to major corporate accounts a diversified range of products to the youth market a diversified range of advertising, promotional and marketing services designed to reach the youth market. In April 1968 Marketing had its first and only public offering of stock. Peat was not its auditor at the time.

Peat took on the engagement in August 1968 after checking with the previous auditors that there had been no professional disagreement with management. Natelli, the partner in charge of Peat's Washington office, undertook the engagement to audit the financial statements of Marketing for the fiscal year ended August 31, 1968, and Natelli assigned Scansaroli to serve as supervisor on the engagement.

In late September or early October 1968 (after the close of the fiscal year), Randell and Bernard Kurek, Marketing's Comptroller, met with both appellants and discussed the method of accounting that Marketing had been using with respect to fixed-fee programs. In the fixed-fee program, Marketing would develop overall marketing programs for the client to reach the youth market by utilizing a combination of the mailings, posters and other advertis-

ing services offered by Marketing. Randell explained that Marketing and the client agreed upon a fixed fee to be charged for participating in the various programs. Randell stated that the company believed that it was proper to recognize income on these fixed-fee contracts at the time the clients committed themselves to participate in the programs presented to them by the account executives, and that this was the accounting method that had been used in preparing the financial statements for the period ended May 31, 1968, which had been distributed to stockholders.

After considering alternative methods of accounting, Natelli concluded that he would use a percentage-of-completion approach to the recognition of income on these commitments, pursuant to which the company would accrue that percentage of the gross income and related costs on a client's "commitment" that was equal to the proportion of the time spent by the account executive on the project before August 31, 1968 to the total time it was estimated he would have to spend to complete the project.

The difficulty immediately encountered was that the "commitments" had not been booked during the fiscal year, and were not in writing. The Marketing stock which had initially been sold at $6 per share was selling in the market by September 1968 for $80, an increase of $74 in five months. A refusal to book the oral "commitments" would have resulted in Marketing's showing a large loss for the fiscal year—according to Kurek's computations, a loss of $232,000.

Scansaroli, upon Natelli's order, attempted to verify the "commitments," the sales not previously included in the company records, in a rather haphazard manner by telephone to representatives of companies which had purportedly indicated some intent to use Marketing's services. Pursuant to Randell's urging, Scansaroli did not seek any written verifications. He accepted a schedule prepared by Kurek which showed about $1.7 million in purported "commitments." He also received from the account executives forms indicating estimates of the gross amount of the client's commitment, the printing and distribution costs to be incurred on the program, and the account executive's estimate of the percentage of completion of the program.

On the basis of the above, Natelli decided not only to recognize income on a percentage-of-completion basis, but to permit adjustment to be made on the books after the close of the fiscal year in the amount of $1.7 million for such "unbilled accounts receivable." This adjustment turned the loss for the year into a handsome profit of $388,031, showing an apparent doubling of the profit of the prior year.

Appellants were not charged with a criminal violation with respect to this decision. It may be observed, however, that in the footnote to the audited financial statement for 1968 explaining this method of accounting for "Contracts in Progress," no indication is given of the flimsy nature of the evidence that such client "commitments" actually existed.

After the 1968 audit had been given a full certificate by the auditors on November 14, 1968, Natelli in December 1968 told the officers of Marketing that in the future Peat would allow income to be recorded only on written commitments, supported by contemporaneous logs kept by the account executives with respect to each contract. A form letter was drafted to spell out a binding contractual commitment to be signed by each client.

In the meantime, following the issuance of the 1968 audited annual report and before the September 1969 proxy statement, seven companies were acquired largely in exchange for Marketing stock, in reliance on the 1968 annual report.

Things began to happen with respect to the $1.7 million of "sales" that had been recorded as income after fiscal year end. Within five months of publication of the annual report, by May 1969, Marketing had written off over $1 million of the $1.7 million in "sales" which the auditors had permitted to be booked.

Of the total $1 million written off, $748,762 was attributable to "sales" purportedly made by one Ronald Michaels, an account executive who was fired for taking kickbacks and who was said to be dishonest. The other quarter of a million dollars of sales written off had nothing to do with Michaels. When accrued costs were taken into account, the effect of the write-off of the Michaels contracts was to reduce 1968 income by $209,750. It appeared that of the $1 million of sales requiring retroactive write-off, $350,000 had already been written off by the company by subtracting these "sales" from 1969 *current* year figures. An additional $678,000 was to be written off sales for the prior year 1968, and appellants were asked to design the write-off. The write-off suggested by appellants was accepted and entered in the general ledger as a journal voucher entry sometime in late April or early May.

That entry wrote off the $678,000 retroactively as a deduction from 1968 sales. Instead of reducing 1968 earnings commensurately, however, no such reduction was made. Appellants were informed by tax accountants in Peat's employ that a certain deferred tax item should be reversed, resulting in a tax credit that happened to be approximately the same amount as the profit to be written off. Scansaroli "netted" this extraordinary item (the tax credit) with an unrelated ordinary item (the write-off of sales and profits). By this procedure he helped to conceal on the books the actual write-off of profits, further

using the device of rounding off the tax item to make it conform exactly to the write-off.[3] The effect of the netting procedure was to bury the retroactive adjustment which should have shown a material decrease in earnings for the fiscal year ended August 31, 1968.

The Proxy Statement

A. *The Footnote*

As part of the proxy statement, appellants set about to draft a footnote purporting to reconcile the Company's prior reported net sales and earnings from the 1968 report with restated amounts resulting from pooled companies reflected retroactively. The earnings summary in the proxy statement included companies acquired after fiscal 1968 and their pooled earnings. The footnote was the only place in the proxy statement which would have permitted an interested investor to see what Marketing's performance had been in its preceding fiscal year 1968, as retroactively adjusted, separate from the earnings and sales of the companies it had acquired in fiscal 1969.[4]

At Natelli's direction, Scansaroli subtracted the written-off Marketing sales from the 1968 sales figures for the seven later acquired pooled companies without showing

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3 This procedure was approved by Natelli, for in the first printed draft of the proxy statement he prepared a footnote which lumped contract losses for 1968 and the tax adjustment, stating that "the net effect of the retroactive adjustment was a $21,000 decrease in net earnings for the year 1968."

4 A vigilant and knowledgeable stockholder who had saved his 1968 financial report could have discovered, by matching it with the balance sheet in the proxy statement, that unbilled receivables for the year ended August 31, 1968 were now $1,015,230 as against $1,763,992 in the earlier document, but he would not know why there was a difference. Footnote "e" read: "Figures for 1968 have been restated in certain instances to make their presentation consistent with current accounting practices. There was no material effect as a result of such restatement."

any retroactive adjustment for Marketing's own fiscal 1968 figures. There was no disclosure in the footnote that over $1 million of previously reported 1968 sales of Marketing had been written off. All narrative disclosure in the footnote was stricken by Natelli. This was a violation of Accounting Principles Board Opinion Number 9, which requires disclosure of prior adjustments which affect the net income of prior periods.[5]

B. *The False Nine Months Earnings Statement*

The proxy statement also required an unaudited statement of nine months earnings through May 31, 1969. This was prepared by the Company, with the assistance of Peat on the same percentage of completion basis as in the 1968 audited statement. A commitment from Pontiac Division of General Motors amounting to $1,200,000 was produced two months after the end of the fiscal period. It was dated April 28, 1969.

The proxy statement was to be printed at the Pandick Press in New York on August 15, 1969. At about 3 A.M. on that day, Natelli informed Randell that the "sale" to the Pontiac Division for more than $1 million could not be treated as a valid commitment because the letter from

5 Accounting Principles Board Opinion Number 9, issued December, 1966, reads in relevant part:

> "26. When prior period adjustments are recorded, the resulting effects (both gross and net of applicable income tax) on the net income of prior periods should be disclosed in the annual report for the year in which the adjustments are made. [The Board recommends disclosure, in addition. In interim reports issued during that year subsequent to the date of recording the adjustments.] When financial statements for a single period only are presented, this disclosure should indicate the effects of such restatement on the balance of retained earnings at the beginning of the period and on the net income of the immediately preceding period."

APB Accounting Principles: Original Pronouncements, Vol. 2, p. 6562 (1969).

Pontiac was not a legally binding obligation. Randell responded at once that he had a "commitment from Eastern Airlines" in a somewhat comparable amount attributable to the nine months fiscal period (which had ended more than two months earlier). Kelly, a salesman for Marketing, arrived at the printing plant several hours later with a commitment letter from Eastern Airlines, dated August 14, 1969, purporting to confirm an $820,000 commitment ostensibly entered into on May 14, just before the end of the nine-month fiscal period of September 1, 1968 through May 31, 1969. When the proxy statement was printed in final form, the Pontiac "sale" had been deleted, but the Eastern "commitment" had been inserted in its place.

Soon after the incident at Pandick Press, Douglas Oberlander, an accountant at Peat assigned by Natelli to review Marketing's accounts, discovered $177,547 worth of "bad" contracts from 1968 which were known to Scansaroli in May, as doubtful, but which had not been written off. Oberlander suggested to Kurek that these contracts and others amounting to over $320,000 in addition to the $1 million in bad contracts previously disposed of, be written off. Kurek consulted Scansaroli, who, after consulting with Natelli, decided against the suggested write-off.

The proxy statement was filed with the SEC on September 30, 1969. There was no disclosure that Marketing had written off $1 million of its 1968 sales (over 20%) and over $2 million of the $3.3 million in unbilled sales booked in 1968 and 1969. A true disclosure, which was not made, would have shown that without these unbilled receivables, Marketing had no profit in the first nine months of 1969.

Each appellant contends that the evidence was insufficient to support his conviction. We shall consider each appellant separately.[6]

I

Natelli—Sufficiency of Evidence

It is hard to probe the intent of a defendant. Circumstantial evidence, particularly with proof of motive, where available, is often sufficient to convince a reasonable man of criminal intent beyond a reasonable doubt. When we deal with a defendant who is a professional accountant, it is even harder, at times, to distinguish between simple errors of judgment and errors made with sufficient criminal intent to support a conviction, especially when there is no financial gain to the accountant other than his legitimate fee.

Natelli argues that there is insufficient evidence to establish that he knowingly assisted in filing a proxy statement

6 Natelli contends that a later incident reveals his lack of intent to deceive. In September 1969, John Johnston, a staff accountant with Peat, was assigned to prepare the audit of Marketing's books for the fiscal year ended August 31, 1969. He discovered the uncollectible contracts found by Oberlander in August and reported them to his superior, William Colona, who had replaced Scansaroli as audit supervisor when Scansaroli joined Marketing as an employee in October. Later in October, Peat was asked to prepare a "comfort letter" in connection with Marketing's acquisition of Interstate National Corporation, to assure Interstate that no adverse information concerning the unaudited statements for the period ended May 31, 1969 had been discovered since the acquisition contract had been signed in August. Colona and Johnston drafted a "comfort letter" noting adjustments which completely wiped out Marketing's first three-quarter earnings for 1969 of $700,000 as they had been carried in the proxy statement. Natelli acquiesced. The draft "comfort letter" did not deter Interstate from closing the transaction, and Peat decided, at the suggestion of Natelli, to send the letter to the other companies being acquired, which had failed to require such a "comfort letter" in their contracts. Natelli urged this at trial as proof of his good faith, and the trial judge fairly stated to the jury his contention in that regard.

which was materially false. After searching consideration, we are constrained to find that there was sufficient evidence for his conviction.

The arguments Natelli makes in this court as evidence of his innocent intent were made to the jury and presented fairly. There is no contention that Judge Tyler improperly excluded any factual evidence offered. While there is substance to some of Natelli's factual contentions for jury consideration, we cannot find, on the totality of the evidence, that he was improperly convicted.

The original action of Natelli in permitting the booking of unbilled sales after the close of the fiscal period in an amount sufficient to convert a loss into a profit was contrary to sound accounting practice, particularly when the cost of sales based on time spent by account executives in the fiscal period was a mere guess. When the uncollectibility, and indeed, the non-existence of these large receivables was established in 1969, the revelation stood to cause Natelli severe criticism and possible liability. He had a motive, therefore, intentionally to conceal the write-offs that had to be made.

Whether or not the deferred tax item was properly converted to a tax credit, the jury had a right to infer that "netting" the extraordinary item against ordinary earnings on the books in a special journal entry was, in the circumstances, motivated by a desire to conceal.

With this background of motive, the jury could assess what Natelli did with regard to (1) the footnote and (2) the Eastern commitment and the Oberlander "bad" contracts.

A. *The Footnote*

Honesty should have impelled appellant to disclose in the footnote which annotated their own audited statement for

fiscal 1968 that substantial write-offs had been taken, after year end, to reflect a loss for the year. A simple desire to right the wrong that had been perpetrated on the stockholders and others by the false audited financial statement should have dictated that course. The failure to make open disclosure could hardly have been inadvertent, or a jury at least could so find, for appellants were themselves involved in determining the write-offs and their accounting treatment. The concealment of the retroactive adjustments to Marketing's 1968 year revenues and earnings could properly have been found to have been intentional for the very purpose of hiding earlier errors.[7] There was evidence that Natelli himself changed the footnote to its final form .

That the proxy Statement did not contain a formal reaudit of fiscal 1968 is not determinative. The accountant has a duty to correct the earlier financial statement which he had audited himself and upon which he had issued his certificate, when he discovers "that the figures in the annual report were substantially false and misleading," and he has a chance to correct them. See *Fischer* v. *Kletz*, 266 F. Supp. 180, 183 (S.D.N.Y. 1967) (Tyler, *J.*). See also *Gold* v. *DCL Inc.*, 1973 CCH Fed. Sec. L. Rep. ¶ 94,036 at p. 94,168 (Frankel, *J.*). The accountant owes a duty to the public not to assert a privilege of silence until the next audited annual statement comes around in due time. Since companies were being acquired by Marketing for its shares in this period, Natelli had to know that the 1968 audited statement was being used continuously.

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7 Natelli contends that the write-offs were of sales of Michaels, an allegedly corrupt salesman, and that since Michaels had been fired, the problem was not likely to recur. But the Government proved that at a meeting on June 9, 1969 at which Natelli was present, the Controller produced charts showing that of the $1.5 million of 1968 sales analyzed, about $900,000 had been written off. Of these, about $700,000 were sales of Michaels, $200,000 of another salesman, Ganis. (In addition, a third salesman had accounted for $213,000 of the 1968 sales, not a dollar of which had yet been billed).

The argument that the disclosure was not material is weak, since applying write-offs only against pooled earnings, without further explanation, conceals the effect of the write-offs on the prior reported earnings of the principal company. It is the disclosure of the true operating results of Marketing for 1968, now come to light, that was material. Materiality is an objective matter, not necessarily limited by the accountant's own uncontrolled subjective estimate of materiality, see *United States* v. *Simon*, 425 F.2d 796, 806 (2 Cir. 1969), *cert. denied*, 397 U.S. 1006 (1970). In any event, the Court charged that the earnings figures would have to be "known to be false in a material way"—a subjective test.

B. *The Eastern Commitment and the Nine-Month Earnings Statement*

The Eastern contract was a matter for deep suspicion because it was substituted so rapidly for the Pontiac contract to which Natelli had objected, and which had, itself, been produced after the end of the fiscal period, though dated earlier. It was still another unbilled commitment produced by Marketing long after the close of the fiscal period. Its spectacular appearance, as Natelli himself noted at the time, made its replacement of the Pontiac contract "weird."[8] The Eastern "commitment" was not only in substitution for the challenged Pontiac "commitment" but strangely close enough in amount to leave the projected earnings figures for the proxy statement relatively intact. Marketing had only time logs of a salesman relating to the making of the proposals but no record

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8 Natelli's explanation that only the suggestion of Randell for *complete* replacement of the Pontiac contract *without changing the figures at all*, was "weird" is not convincing. Certainly the jury could find otherwise.

of expenditures on the Eastern "commitment," no record of having ever billed Eastern for services on this "sale," and not one scrap of paper from Eastern other than the suddenly-produced letter. Nevertheless, it was booked as if more than $500,000 of it had already been earned.

Natelli contends that he had no duty to verify the Eastern "commitment" because the earnings statement within which it was included was "unaudited."

This raises the issue of the duty of the CPA in relation to an unaudited financial statement contained within a proxy statement where the figures are reviewed and to some extent supplied by the auditors. It is common ground that the auditors were "associated" with the statement and were required to object to anything they actually "knew" to be materially false. In the ordinary case involving an unaudited statement, the auditor would not be chargeable simply because he failed to discover the invalidity of booked accounts receivable, inasmuch as he had not undertaken an audit with verification. In this case, however, Natelli "knew" the history of post-period bookings and the dismal consequences later discovered. Was he under a duty in these circumstances to object or to go beyond the usual scope of an accountant's review and insist upon some independent verification? The American Institute of Certified Public Accountants, Statement of Auditing Standards No. 1—Codification of Auditing Standards and Procedures (1972), 1 CCH AICPA Professional Standards §516.00, recognizes that "if the certified public accountant concludes in the basis of facts known to him that unaudited financial statements with which he may become associated are not in conformity with generally accepted accounting principles, *which include adequate disclosure*, he should insist . . . upon appropriate revision . . . " (emphasis added).

We do not think this means, in terms of professional standards, that the accountant may shut his eyes in reckless disregard of his knowledge that highly suspicious figures, known to him to be suspicious, were being included in the unaudited earnings figures with which he was "associated" in the proxy statement.

The auditor's duty is not as restricted as appellants urge where, as here, the auditors, rather than the company, controlled the figures, as is evidenced by Natelli's rejection of the Pontiac contract as one he would not accept for the subsequent audited financial statement for 1969, and where the erroneous figures had previously been certified by his firm. Cf. *Fischer* v. *Kletz*, *supra*, 266 F. Supp. at 188, 189 (S.D.N.Y. 1967). We reject the argument of insufficiency as to Natelli, who could have pointed out the error of his previous certification and deliberately failed to do so, our function being limited to determining whether the evidence was sufficient for submission to the jury. *United States* v. *Simon*, *supra*, 425 F.2d at 799. We hold that it was. We discuss the objections to the charge below.

There are points in favor of Natelli, to be sure, but these were presented to the jury and rejected. These included, with their counterbalance: his rejection of the Pontiac commitment (with substitution of the Eastern contract); his discussion of the footnote with his superior, Leon Otkiss (without full disclosure to Otkiss of all relevant factors); his insistence on dissemination of the comfort letter (See note 6) (but his failure to disclose the huge past write-offs of Marketing resulting in no profit for 1968 or nine months of 1969).

Scansaroli—Sufficiency of Evidence

The claim of Scansaroli with respect to insufficiency of the evidence is somewhat more difficult. As Judge Tyler noted after both sides had rested, "It is a close question, I think frankly as to Scansaroli, as I see it. Certainly if I were the factfinder, I would be more troubled with his case for a variety of reasons."

Scansaroli contends that there was insufficient evidence to prove beyond a reasonable doubt that (1) he participated in a criminal act with respect to the footnote or (2) that he made an accounting judgment permitting Marketing to include in sales certain contracts-in-progress with the requisite criminal intent. We hold that there was enough evidence to establish the former, but not the latter. For reasons relating to the form of the charge, we will reverse and remand for a new trial.

A. *The Footnote*

The essence of Scansaroli's argument on his conviction with respect to the false footnote is that he was really convicted for his conduct during the 1968 audit, for which he was not indicted. This misses the thrust of the Government's claim. The unjustifiable manner of treating the unbilled commitments in the 1968 audit bore upon the illegal acts connected with the 1969 proxy statement in two ways: (a) it created a motive to conceal the accounting errors made in the 1968 audit; and (b) the 1968 audited statement was part of the 1969 proxy statement and was not disclosed therein to have been wrong in the light of the subsequent known write-offs. In view of the established motive to conceal, the jury could properly find, as we have seen, that both the netting of the tax credit against earnings and the subsequent subtracting of the write-offs from the pooled earnings in the footnote without further explanation were done in order to conceal the true retroactive decrease in the Marketing earnings for fiscal 1968.

There is some merit to Scansaroli's point that he was simply carrying out the judgments of his superior Natelli. The defense of obedience to higher authority has always been troublesome. There is no sure yardstick to measure criminal responsibility except by measurement of the degree of awareness on the part of a defendant that he is participating in a criminal act, in the absence of physical coercion such as a soldier might face. Here the motivation to conceal undermines Scansaroli's argument that he was merely implementing Natelli's instructions, at least with respect to concealment of matters that were within his own ken.

We think the jury could properly have found him guilty on the specification relating to the footnote. Scansaroli himself wrote the journal entry in Marketing's books which improperly netted the tax credit with earnings, the true effect never being pointed out in the financial statement. This, with the background of Scansaroli's implication in preparation of the 1968 statement, could be found to have been motivated by intent to conceal the 1968 overstatement of earnings.

Scansaroli participated in the decision to subtract in the proxy statement footnote $678,000 of written-off Marketing sales from the figures for later-acquired pooled companies instead of from its own figures, without further disclosure. Even if Scansaroli did not write the footnote, he supplied the misleading computations and subtractions though he was conscious of the true facts.

B. *The Eastern Commitment*

Having concluded that there was sufficient evidence to convict both appellants on the footnote specification, we turn to the nine-months earnings statement which, in turn, included two items, the Eastern contract and the doubtful commitments discovered by Oberlander. We put aside the decision to ignore Oberlander's questioning of certain commitments on the ground that, if it stood alone, the evidence would have been too equivocal to support proof beyond a reasonable doubt that this was not a mere error of judgment.

With respect to the major item, the Eastern commitment, we think Scansaroli stands in a position different from that of Natelli. Natelli was his superior. He was the man to make the judgment whether or not to object to the last-minute inclusion of a new "commitment" in the nine-month statement. There is insufficient evidence that Scansaroli engaged in any conversations about the Eastern commitment at the Pandick Press or that he was a participant with Natelli in any check on its authenticity. Since in the hierarchy of the accounting firm it was not his responsibility to decide whether to book the Eastern contract, his mere adjustment of the figures to reflect it under orders was not a matter for his discretion. As we have seen, Natelli bore a duty in the circumstances to be suspicious of the Eastern commitment and to pursue the matter further. Scansaroli may also have been suspicious, but rejection of the Eastern contract was not within his sphere of responsibility. Absent such duty, he cannot be held to have acted in reckless disregard of the facts.

III

Appellants contend that the trial court erroneously instructed the jury on the issue of knowledge. We do not agree.

The thrust of appellant's argument, as we understand it, is that the judge charged that each appellant could be convicted "if [his] failure to discover the falsity of [Marketing's] financial statements was the result of some form of gross negligence." We do not read the charge that way. It followed the charge of Judge Mansfield which was sustained in *United States* v. *Simon, supra.*[9]

It was a balanced charge which made it clear that negligence or mistake would be insufficient to constitute guilty knowledge. *See United States* v. *Bright,* —— F.2d ——, Slip Op. 3625 (2 Cir., May 21, 1975). Judge Tyler also carefully instructed the jury that "good faith, an honest belief in the truth of the data set forth in the footnote and entries in the proxy statement would constitute a complete defense here." On the other hand, "Congress equally could not have intended that men holding themselves out as members of these ancient professions [law and accounting] should be able to escape criminal liability on a plea of ignorance when they have shut their eyes

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9 Judge Tyler charged, in pertinent part, as follows:

"While I have stated that negligence or mistake do not constitute guilty knowledge or intent, nevertheless, ladies and gentlemen, you are entitled to consider in determining whether a defendant acted with such intent if he deliberately closed his eyes to the obvious or to the facts that certainly would be observed or ascertained in the course of his accounting work or whether he recklessly stated as facts matters of which he knew he was ignorant.

If you find such reckless deliberate indifference to or disregard for truth or falsity on the part of a given defendant, the law entitled you to infer therefrom that that defendant wilfully and knowingly filed or caused to be filed false financial information of a material nature with the SEC.

But such an inference, of course, must depend upon the weight and credibility extended to the evidence of reckless and indifferent, conduct, if any.

I repeat: Ordinary or simple negligence or mistake alone would be insufficient to support a finding of guilty knowledge or wilfulness or intent."

to what was plainly to be seen or have represented a knowledge they knew they did not possess." *United States* v. *Benjamin*, 328 F.2d 854, 863 (2 Cir.) *cert. denied, sub nom. Howard* v. *United States*, 377 U.S. 953 (1964); and *see United States* v. *Brawer*, 482 F.2d 117, 128-29 (2 Cir. 1973).

One of the bases for attack on the charge is that in charging "reckless disregard for the truth or falsity" or "closing his eyes," there must also be an instruction like "and with a conscious purpose to avoid learning the truth."

It is true that we have favored this charge in false statement cases, *United States* v. *Sarrantos*, 455 F.2d 877, 880-82 (2 Cir. 1972), while noting that both phrases "mean essentially the same thing," *id.* at 882; and in cases involving knowledge that goods were stolen, *United States* v. *Brawer, supra*, 482 F.2d at 128-29 (2 Cir. 1973); *United States* v. *Jacobs*, 475 F.2d 270, 287 (2 Cir.), *cert. denied*, 414 U.S. 821 (1973). The dual instruction is not necessarily required, however, when the defendant is under a specific duty to discover the true facts, the facts tendered are suspect, and he does nothing to correct them. In *United States* v. *Benjamin, supra*, 328 F.2d at 862, this court said, regarding an accountant, that "the Government can meet its burden by proving that a defendant deliberately closed his eyes to facts he had a duty to see." And *United States* v. *Simon, supra*, which affirmed the conviction of an accountant, as we have seen, sustained a charge in the very language Judge Tyler tracked.

While the facts in each case are not precisely the same, we think this appeal quite analogous to *Simon, supra*, because Natelli was suspicious enough of the Eastern contract to check it with Kelly, the account executive in house, but not to take the next step of seeking verification from

Eastern, despite his obvious doubt that it could be booked as a true commitment. And with respect to the footnote, we think the language of this court in *Simon* to be quite pertinent, "The jury could reasonably have wondered how accountants who were really seeking to tell the truth could have constructed a footnote so well designed to conceal the shocking facts." 425 F.2d at 807.

Appellants argue strenuously, however, that *U. S.* v. *Simon, supra*, involved an audited statement while the nine months statement here involved was an unaudited statement, and, that hence, the duties of appellants here were different from those enunciated in *Simon*. They urge as a corollary that the District Court failed to instruct the jury on the difference, and that his failure to do so was reversible error.

It is true that the point on appeal might have been eliminated if the judge had charged on the differences in the abstract. But in the circumstances he was not required to do so. As we have seen, *supra*, Point I, the duty of Natelli, given this set of facts, was not so different from the duty of an accountant upon an audit as to require sharply different treatment of that duty in the charge to the jury.

We agree with Judge Tyler when he charged the jury that they could find Natelli "knew" of the falsely material fact if he acted in "reckless disregard" or deliberately closed his eyes to the obvious. The issue on this appeal is not what an auditor is *generally* under a duty to do with respect to an unaudited statement, but what these defendants had a duty to do in these unusual and highly suspicious circumstances. *Cf. United States* v. *Simon, supra*, 425 F.2d at 806-07. Nor was a proper charge requested.

The duly requested supplemental charge on Natelli's duty with respect to the unaudited earnings statement was properly denied. It read:

> "The defendants' *only* responsibility as to this statement [unaudited statement of earnings for the nine months ended May 31, 1969] was to be satisfied that, *as far as they knew,* the statement contained no misstatement of material facts." (emphasis added).

This requested charge was not correct, for even on an unaudited statement with which Natelli was "associated" and where there were suspicious circumstances, his duty went further, as we have seen. As the Court correctly charged, Natelli was culpable if he acted in "reckless disregard" of the facts or if he "deliberately closed his eyes."

We expound no rule, to be sure, that an accountant in reviewing an unaudited company statement is bound, without more, to seek verification and to apply auditing procedures. We lay no extra burden on the normal activities of accountants, nor do we assume the role of an Accounting Principles Board. We deal only with such deviations as fairly come within the common understanding of dishonest conduct which jurors bring into the box as applied to the particular conduct prohibited by the particular statute.

It was not for Judge Tyler in his instructions to deal with the abstract question of an accountant's responsibility for unaudited statements, for that was not the issue. So long as we find that the Judge explicated the proper test applicable to the facts of this case, the duty inherent in the circumstances, and we do, we must also find that he gave the appellants a fair charge.

IV

The Charge on "Unanimity"

The trial judge charged as follows:

> "Now, I instruct you that if you find that the proxy statement was false in either one of these two respects that is sufficient to support a conviction."

As we have seen, there were two specifications of falsity in Count II, namely, the footnote and the earnings statement. The defense requested that the court advise the jury that in order to convict, they must be unanimous on which, if either, of the two specifications had been proven materially false beyond a reasonable doubt.[10] This request was refused, and the court did not charge accordingly.

Appellants now contend that the charge given left the jury free to convict if only six of them believed the proxy statement to be materially false in one respect but the other six believed the proxy statement to be materially false in the other respect. Appellants conclude that even if the evidence was sufficient to warrant the submission of each of the allegedly false statements to the jury, the conviction still cannot stand, since it cannot be determined whether the jury did in fact unanimously agree on a single specification of falsity. Appellants cite no authority directly in point. The government cites no direct authority in this circuit, but cites two cases in the Ninth Circuit. *United States* v. *Friedman*, 445 F.2d 1076, 1083-84, *cert. denied, sub nom. United States* v. *Jacobs*, 404 U.S. 958 (1971) and *Vitello* v. *United States, supra*, 425 F.2d at 422-23, as directly in point. However, these cases are distinguishable.

10 This was not a request for a special verdict. *Cf. United States* v. *Spock*, 416 F.2d 165, 180-83 (1 Cir. 1969); and see *U.S.* v. *Adcock*, 447 F.2d 1137 (2 Cir. 1971).

In *Friedman*, the indictment alleged a conspiracy to violate several substantive statutes. The jury found appellants guilty of the conspiracy and of acts charged in particular substantive counts, thus indicating which violations in the conspiracy count the jury had found unanimously.

Vitello turned largely on the failure of counsel to object at trial. The court noted, however, that it would have had to follow *Yates* v. *United States*, 354 U.S. 298, 311-12 (1957) if "there was insufficient evidence to be submitted to the jury on any one or more of the specifications of falsity". 425 F.2d at 419.

The charge given by Judge Tyler is a charge generally given in this circuit. It is assumed that a general instruction on the requirement of unanimity suffices to instruct the jury that they must be unanimous on whatever specifications they find to be the predicate of the guilty verdict. We do not say it would be wrong for a trial judge to give the charge requested, but it is not error to refuse it.[11] And we do not change that rule.

The court properly charged that the jury needed only to find a defendant guilty on either of the two specifications in order to convict. Inasmuch as the evidence was sufficient to support Natelli's conviction on either specification, the charge given presents no problem to affirmance as to him.

11 In reaching this result, we believe that we are following *United States* v. *Remington*, 191 F.2d 246, 250 (2 Cir. 1951) (L. Hand, A. Hand & Swan, *JJ.*). There the defendant was convicted of perjury in falsely testifying before the Grand Jury that he had never been a member of the Communist Party. He had requested a charge that "all jurors must be convinced that the accused was a member of the Party 'at a particular time and place,' and if some thought he was at one time only and some another, they could not convict him." Judge Swan agreed that "that request was right and should be given if there is a new trial" but he refused to label it reversible error to refuse the charge "since the substance of it was probably covered, though not so explicitly, by the charge that the jury must be unanimous."

A difficulty does arise, however, if it is found as a matter of law that there should have been a directed verdict for a defendant on one of the specifications for insufficiency of evidence. The verdict then becomes ambiguous, for the jury could have rejected the specification which the appellate court holds sufficiently proved, and have convicted only on the specification held to be insufficiently proved. In that event, there seems to be no alternative to remand for a new trial. That is the general principle. *Yates* v. *United States, supra; Stromberg* v. *California*, 283 U.S. 359, 367-68 (1931). *See United States* v. *Jacobs, supra*, 475 F.2d at 283 and cases cited therein.

It is true, of course, that sometimes, as in conspiracy to violate two different substantive statutes, the same evidence may support conviction of conspiracy to violate either or both. *See e.g., Jacobs, supra*, 475 F.2d at 283-84.

When there is more than one specification as a predicate for guilt, each dependent on particular evidence which is unrelated to the other, it would be sound practice to instruct the jury that they must be unanimous on a particular specification to convict. Since that was not done here and since we have found that Scansaroli was not culpable on the earnings statement specification, the essence of which was the inclusion of the Eastern commitment, we must reverse his conviction and remand for trial on the footnote specification alone. We realize that we are reversing a conviction involving only 10 days of jail time. Whether it is important enough for the United States to retry him in the circumstances is a matter for decision by the United States Attorney on which we cannot pass judgment.

V

Appellants contend that Count II of the indictment should be dismissed for lack of proper venue. Prior to trial, appellants had jointly moved to dismiss Count II on the ground that proper venue lay only where the proxy statement had been filed with the Securities and Exchange Commission, the District of Columbia. The trial court denied the motion. We must consider the issue with the recognition that venue in criminal cases may raise "deep issues of public policy". *See United States* v. *Johnson*, 323 U.S. 273, 276 (1944).

Section 27 of the Securities Exchange Act, 15 U.S.C. § 78aa, provides that criminal proceedings for violations of the Act are to be brought in a district where "any act or transaction constituting the violation occurred." Appellants contend that the only critical act here was the filing of the proxy statement containing the false statements in the District of Columbia where it was delivered to the Commission, which is also where appellants' and Marketing's principal offices were. The government contends that there is venue for a charge of violation of section 32 of the 1934 Act, 15 U.S.C. § 78ff,[12] in the Southern District of New York as well. The government asserts that it has proved that the false footnote and the false nine months earnings statement were prepared in Manhattan, and that this suffices.[13]

In denying the pre-trial motion, the District Court held that the gravamen of the violation under Section 32 was the making of the false statement, not the filing, the words of the statute "required to be filed" merely describing a category of documents rather than the essence of the of-

12 See note 1, *supra*.

13 Appellants do not seriously contend that there was no preparation in the Southern District as a matter of fact.

fense. The government, in support, notes the general venue provision for continuing offenses.[14]

Appellants retort that Section 27 of the 1934 Act stands apart from the continuing offense statute, arguing that it comes within the exception used when Congress has specifically provided for alternate venue. Appellants find support in *Travis* v. *United States*, 364 U.S. 631 (1961) which held that the proper venue for an offense under 18 U.S.C. § 1001, the False Statements Act, was not the district in which the false statement was made, but only the district where the affidavit had to be filed, the District of Columbia. The rationale of the decision, as we read it, was that section 1001 proscribes false statements "in any matters within the jurisdiction of any department or agency of the United States" and that the National Labor Relations Board had no such "jurisdiction" under Section 9(h) of the National Labor Relations Act as amended,[15] until the non-Communist affidavit required by the statute as a precondition to N.L.R.B. investigation was actually filed in Washington, D.C.[16]

The majority opinion in *Travis* was careful to note that "[t]he decisions are discrete, each looking to the nature of the crime charged." 364 U.S. at 635. And this court has

14 18 U.S.C. § 3237(a) reads:

(a) Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

15 61 Stat. 136, 146, amended, § 1(d), 65 Stat. 601, 602, repealed, § 201 (d) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 525.

16 If the "jurisdiction of the agency" exists where the false statement is made, however, the continuing offense statute is applicable to ve[illegible] even in section 1001 cases. *United States* v. *Candella*, 487 F.2d [illegible] (2 Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

annotated *Travis* by stating that "the decision surely was meant to be confined to the facts based on the unusual statute involved." *See United States* v. *Slutsky*, 487 F.2d 832, 839 n.8 (2 Cir. 1973), *cert. denied*, 416 U.S. 937 (1974). *See* also *United States* v. *Ruehrup*, 333 F.2d 641, 643 (7 Cir.), *cert. denied*, 379 U.S. 903 (1964); *Imperial Meat Co.* v. *United States*, 316 F.2d 435, 440 (10 Cir.), *cert. denied*, 375 U.S. 820 (1963).

Appellant seeks to come within the *Travis* holding by arguing that just as in *Travis* where the filing of the non-Communist affidavit was simply a prerequisite to future conduct, resort to NLRB processes, so the filing of a proxy statement is merely the prerequisite to future conduct, the solicitation of proxies. The argument is unsound.

In *Travis*, the labor board had no jurisdiction to make an investigation of labor practices "unless there is on file with the Board" a non-Communist affidavit. Here the filing of the proxy statement is part of the continuous process of the solicitation of proxies. Proxy statements are filed only at such time as the persons filing require proxies for some corporate purpose.[17] The filing and solicitations are part of the same process. We hold that there was venue in the Southern District of New York.

We have considered the other arguments raised by appellants and find them without merit. Judgment affirmed as to appellant Natelli; as to appellant Scansaroli judgment reversed and remanded for a new trial.

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17 We may note, that paradoxically, in most cases arising under the 1934 Act, the defendants would presumably contend that they wished to be tried in their home districts rather than in the District of Columbia. Here the appellants happen to live and work in the District of Columbia and have been tried elsewhere, a rather unusual situation.

APPENDIX B

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-eighth day of July one thousand nine hundred and seventy-five.

Present:

HON. PAUL R. HAYS

HON. WILLIAM H. MULLIGAN

HON. MURRAY I. GURFEIN

Circuit Judges,

United States of America,

Plaintiff-Appellee,

v.

Cortes W. Randell, Robert C. Bushnell, John G. Davies, Dennis M. Kelly, Bernard J. Kurek, Anthony M. Natelli, Joseph Scansaroli,

Defendants

Anthony M. Natelli, Joseph Scansaroli,

Defendants-Appellants.

75-1004

75-1008

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed as to appellant Anthony M. Natelli but the judgment as to appellant Joseph Scansaroli be and it hereby is reversed and that the action as to appellant Joseph Scansaroli be and it hereby is remanded to said District Court for further proceedings in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk

By Vincent A Carlin
Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1035 & 1036—September Term, 1974.

(Decided October 6, 1975.)

Docket Nos. 75-1004, 75-1008

UNITED STATES OF AMERICA,

Appellee,

v.

ANTHONY M. NATELLI and JOSEPH SCANSAROLI,

Defendants-Appellants.

Before:

HAYS, MULLIGAN and GURFEIN,

Circuit Judges.

ON PETITION FOR REHEARING BY UNITED STATES

GURFEIN, *Circuit Judge:*

The United States petitions for rehearing of that portion of our decision, filed July 28, 1975, slip op. 5165, which reversed the conviction of Scansaroli and remanded for a new trial as to him.

Natelli and Scansaroli were tried and convicted on a single count of wilfully making and causing to be made false and misleading material statements in a proxy statement. The single count specified two false statements: the "footnote" and the "nine-months earnings statement." This court found sufficient evidence on each specification to sustain Natelli's conviction but held as to Scansaroli that there was insufficient evidence to go to the jury on the second specification. On that basis, we concluded that as to Scansaroli the jury might have convicted only on the specification held to be insufficiently proved. Slip op. at 5191. We accordingly remanded for a new trial.

The government calls our attention to cases in this circuit which have held that a general motion to dismiss a count with several specifications is insufficient to preserve on appeal the point that where one of the specifications is insufficiently proved the conviction on the entire count must be reversed. These cases hold that, to preserve the point on appeal, a specific motion must be made in the trial court to withdraw the particular specification from jury consideration. *United States* v. *Mascuch*, 111 F.2d 602, 603 (2 Cir.), *cert. denied*, 311 U.S. 650 (1940); *United States* v. *Goldstein*, 168 F.2d 666, 671 (2 Cir. 1948).

No separate motion was made by Scansaroli to withdraw the earnings statement specification from consideration by the jury. He did move to strike evidence concerning the Eastern Airlines affair and also asked for an instruction that the jury had to be unanimous on each specification, but he did not move to dismiss the specification for insufficiency. The failure to move may have ben dictated by tactical considerations on the theory of his able counsel that it is easier to attack a weak specification in the hope of a spillover to the stronger one. Be that as it may, we feel bound to follow the *Mascuch-Goldstein* rule, particularly in view of its eminent authorship.

Accordingly, we are constrained to grant the government's petition for rehearing, and, upon rehearing, we

withdraw our former determination and affirm the conviction of Scansaroli as well as Natelli.

We might suggest that in view of the turn Scansaroli's case has taken and the short sentence he received from Judge Tyler, the District Judge who inherits the case ought carefully to consider a Rule 35 application to suspend the 10 days of jail time imposed.

APPENDIX D

United States Court of Appeals

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fifth day of November, one thousand nine hundred and seventy-five.

Present: HON. PAUL R. HAYS

HON. WILLIAM H. MULLIGAN

HON. MURRAY I. GURFEIN

Circuit Judges.

United States of America,
Plaintiff-Appellee,
v.
Cortes W. Randell, Robert C. Bushnell, John G. Davies, Dennis M. Kelly, Bernard J. Kurek, Anthony M. Natelli, Joseph Scansaroli,
Defendants,

Anthony M. Natelli, Joseph Scansaroli,
Defendants-Appellants.

75-100[illegible]
75-10[illegible]

A petition for a rehearing having been filed herein by counsel for the appellant, Natelli

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

APPENDIX E

1. Amendment VI of the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . .

2. Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. §78aa, provides in pertinent part:

> The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred.

3. Section 32(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78ff, provides in pertinent part:

> (a) Any person who . . . willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter . . . which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $10,000, or imprisoned not more than two years, or both, except that when such person is an exchange, a fine not exceeding $500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.